(3) 95 No. 210

Supreme Court, U.S.
FILED
AUG 4 1995
CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1995

**HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,**
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

CHAUFFERS, TEAMSTERS AND HELPERS, et al.,
Intervenors.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Volume Two - Appendix to Writ of Certiorari

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD - DIVISION OF JUDGES

HOLLY FARMS CORPORATION
AND ITS SUCCESSOR,
TYSON FOODS, INC.

and Cases 11-CA-13184
11-CA-13267
11-CA-13487

CHAUFFEURS, TEAMSTERS
AND HELPERS LOCAL UNIONS
NOS. 29, 71, 355, 391, 592,
567 and 988, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF
AMERICA, AFL-CIO

HOLLY FARMS CORPORATION AND
ITS SUCCESSOR, TYSON FOODS,
INC.

Employers

and Case 11-RC-5583

CHAUFFEURS, TEAMSTERS AND
HELPERS LOCAL UNION NO. 391,
AFFILIATED WITH INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND
HELPERS OF AMERICA, AFL-CIO
HELPERS OF AMERICA, AFL-CIO

Petitioner

Jasper C. Brown, Jr., and Michael W. Jeannette, Esqs., of Winston-Salem, NC, for the General Counsel.
Jesse S. Hogg and James M. Blue, Esqs. (Hogg, Allen, Norton & Blue, P.A.), of Coral Gables and Tampa, FL, and William C. Warden, Jr., Esq. (McElwee, Cannon & Warden), of North Wilkesboro, NC for the Respondents.
J. David James and Bryan Lessley, Esq. (Smith, Patterson, Follin, Curtis, James Harkavy & Lawrence), of Greensboro, NC, for the Charging Parties.

DECISION

Statement of the Case

ROBERT M. SCHWARTZBART, Administrative Law Judge: These consolidated cases were heard in Wilkesboro and North Wilkesboro, North Carolina, upon complaints issued pursuant to charges filed jointly by Chauffeurs, Teamsters and Helpers Local Unions No. 29, 71, 355, 391, 592, 567 and 988, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

AFL-CIO, hereinafter collectively called the Unions, and separately by Teamsters Local Union No. 391, herein Local 391.[a] The consolidated com-

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[a] All dates hereinafter are within 1989 unless otherwise stated. The relevant docket entries are as follows: The original, amended and second amended charges in Case 11-CA-13267 were filed by Local 391 on April 5, 11 and 18, respectively. The charge, amended charge, second and third amended charges in Case 11-CA-13184 were jointly filed by the Unions on February 8, 16, October 2 and 11, respectively. The charge, amended charge and second amended charge in Case 11-CA-13487 were filed by Local 391 on August 25, 31 and October 12, respectively. The charge and amended charges in Case 11-CA-13520 were filed by the Unions on September 15 and October 24. The charge in Case 11-CA-13619 was filed by the Unions on November 28. The charges in Cases 11-CA-13267 and 11-CA-13619 were filed by Local 391. The charges and amended charges in the remaining aforesaid cases were filed jointly by Local Union Nos. 29, 71, 355, 391, 592, 657 and 988. The complaint in Case 11-CA-13627 and the order consolidating that matter with the consolidated complaint in Cases 11-CA-13184, 11-CA-13487, 11-CA-13520, were dated May 18 and October 13, respectively. The order consolidating the aforesaid cases with the hearing on objections and challenged ballots in Case 11-RC-5583 also issued on October 13. An amended consolidated complaint, issued November 8, and the amended complaint in Case 11-CA-13619, issued January 5, 1990, was consolidated into this proceeding at the hearing. The original complaint in Case 11-CA-13619 had issued on December 28. The

(continued...)

plaints allege that Holly Farms Corporation, herein Holly Farms, violated Section 8(a)(1) and (3) of the National Labor Relations Act, herein the Act, prior to the July 18 purchase of that Company by Tyson Foods, Inc., herein Tyson, and since that date, both Tyson and Holly Farms, herein collectively the Respondents, have acted in violation of Section 8 (a)(1), (3), and (5) of the Act. In this regard, the General Counsel alleges that Tyson, since the July takeover, has been Holly Farms' successor and has succeeded to the asserted predecessor's bargaining obli-

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*(...continued)
complaint in Case 11-CA-13669, issued February 5, 1990, and consolidated into this proceeding at the hearing, later was severed and dismissed upon the General Counsel's motion. The complaints were further amended at the hearing which was held during 25 days between November 27, 1989, and May 2, 1990.

gation with the Unions, as described below. The General Counsel argues that the Respondents should be required to bargain with respect to two bargaining units.

The first such unit, herein the drivers-yardmen unit, was Board-certified on March 24 and includes:

> All driver employees and yardmen at the Respondents' Wilkesboro, North Carolina, Glen Allen (Richmond), Harrisonburg and Temperanceville, Virginia; and Center and Sequin, Texas, facilities; excluding all office clerical employees, and guards and supervisors, as defined in the Act.

As indicated by the above description, the drivers-yardmen unit was widespread so that geographic jurisdiction over the various unit facilities was distributed among the vari-

ous Teamsters local unions herein as follows:

Local Union No.	Locations
29	Harrisburg, VA
355	Temperanceville, VA
592	Glen Allen (Richmond), VA
71	Monroe, VA
391	Wilkesboro, NC
657	Seguin, TX
988	Center (Houston), TX

The other unit, herein the live haul unit, where there has been no Board certification but where a bargaining order has been requested, was found appropriate by the Board in Case 11-RC-5583. This unit includes:[29]

> All of the Employers' live haul (chicken catching crews) employees at the Employers' facilities in Wilkesboro, North Carolina, and the Employers' feed haul, feed mill and service center employees at the Employers' facility in Roaring River, North Carolina; excluding all office employees, guards and supervisors as defined in the Act.

Pursuant to a petition filed by Local 391 in Case 11-RC-5583, a Supplemental Decision and Direction of Election issued by the Regional Director for Region 11 on June 20 and the Board's Decision on Review and Order, dated July 20, a representation election by secret ballot was conducted on July 27 in the above-described bargaining unit including live haul employees.[30] The tally of ballots served upon the parties imme-

[29] Unlike the above-described drivers-yardmen unit, where the seven Teamsters locals were jointly certified, only Local 391 has sought to represent live haul unit employees.

[30] While the petition in Case 11--RC--5583, when filed, then accurately named Holly Farms as the sole employer, Tyson was in control by the time of the July 27 election.

diately following the election showed that of the approximately 198 eligible voters, 187 cast ballots, of which 92 were cast for the Union, 95 were cast against the Union and 10 ballots were challenged. There were no void ballots, but the challenged ballots were sufficient in number to affect the results of the election. Local 391 filed timely objections to conduct affecting the results of the election. In their objections, the Union alleged that in the critical period before the election,[31] the Respondent-Employers, through their duly-authorized representatives, interrogated their employees concerning their union activities and desires; threatened their employees with retaliation because of their union activities; promised their employees benefits to discourage their support of the Union; threatened their employees with discharge if they voted for the Union and if the Union won

[31] In Goodyear Tire and Rubber Company, 138 NLRB 453, the Board defined the critical period before an election as the interval from the date of the filing of the petition to the time of the election. Conduct occurring during this period found to have interfered with the employees' freedom of choice at the polls may be grounds for setting aside the election. As will be discussed below, the Respondents challenge the interrupted application of this rule in the present case on the ground that certain allegations of the (continued...)

[31](...continued)
Respondents' unlawful conduct assertedly affecting the election results occurred during a hiatus period when the petition in Case 11--RC--5583 had been dismissed but had not yet been reinstated. The Respondents, because of this, contend that since no petition was pending when their disputed conduct was to have taken place, then the critical period before the election in this case should date from the reinstatement of the petition rather than from its initial filing, and that the disputed conduct should not be considered as affecting the election results. For reasons which will be detailed below, I find no merit to this argument and will find that, in Case 11--RC--5583, the critical period remained from February 16, when the petition originally was filed, to July 27, the election date.

the election; campaigned in the polling area while the polls were open; gave their employees a wage increase shortly before the election; ordered their employees to cease union handbilling on their premises during non-work time in non-work locations; and threatened the arrest of their employees who had engaged in union handbilling during non-work time in its non-work locations.

On October 13, the Acting Regional Director issued his Order directing that issues raised by the objections to the election and the determinative challenged ballots in Case 11-RC-5583 be resolved in consolidated hearing with Cases 11-CA-13184, 11-CA-13267, 11-CA-13487, 11-CA-13520 and the sub-

sequently consolidated Case 11-CA-13619.

Issues

1. Whether the Respondents by their managers, supervisors and/or other authorized agents, independently violated Section 8(a)(1) of the Act by:

(a) Threatening their drivers-yardmen unit employees that the Respondents' trucking operations would be discontinued and the employees' hauling work contracted to outside firms if they selected the Unions as their collective-bargaining representative.

(b) Threatening their employees that their jobs would be lost if they chose the Unions as their collective-bargaining representative.

(c) Threatening their employees that it would be futile for them to select the Unions as their collective-bargaining agent.

(d) Threatening their employees that the Respondents' trucking operations would be reduced if they failed to accept a collective-bargaining contract that incorporated only existing terms and conditions of employment.

(e) Promulgating, maintaining and enforcing a rule prohibiting their employees from discussing wages among themselves.

(f) Suggesting to employees that they form a committee to negotiate with management instead of selecting the Unions as their collective-bargaining representative.

(g) Threatening their employees with unspecified reprisals for engaging in union activities.

(h) Threatening their employees with retaliation if they selected the Unions as their collective bargaining representative.

(i) Soliciting and promising to resolve their employees' grievances if they rejected the Unions and/or Local 391 as their collective-bargaining representative.

(j) Informing their employees that the Respondents maintained and enforced a no-solicitation rule prohibiting solicitation of any kind at any location on their premises.

(k) Interrogating employees as to their union activities, sympathies and desires.

(l) Directing their employees to cease union handbilling in nonwork areas of the Respondents' premises during non-work hours.

(m) Threatening and causing the arrest of their employees for engaging in union handbilling in non-work areas of the Respondents' premises during non-work time.

(n) Threatening employees that the Respondents' management would know how they voted in a scheduled representation election if they voted in favor of the Local 391.

(o) Discriminatorily prohibiting the posting of union literature on their bulletin boards.

(p) Prohibiting their employees from wearing union hats or insignia.

(q) Engaging in surveillance of their employees' union activities.

(r) Threatening employees with discharge because of their union activities.

2. Whether the Respondents discriminated against employees in violation of Section 8(a)(3) of the Act by:

(a) Discharging and refusing to reinstate employees Alvin Bouchelle, Raymond K. Huffman, Jr., Patricia Barker and Joseph Richardson, because of their union activities.

(b) Issuing written disciplinary warnings to employees Harden Branscome, Teddy Ray Hayes, Gene Hester and James Phillip Church because of their union activities.

(c) Granting live haul unit employees pay increases shortly before a scheduled representation election to discourage union membership or support.

(d) Constructively discharging 47 long distance drivers, members of the drivers-yardmen unit, because of their support for the Unions.

3. Whether the Respondents refused to bargain in good faith with the Unions in violation of Section 8(a)(5) of the Act by:

(a) Constructively discharging the above-noted 47 drivers who had refused to continue to work for the Respondents under unilaterally changed wages, hours and other working conditions imposed by the Respon-

dents without prior bargaining with the Unions.

(b) Withdrawing recognition from the Unions as bargaining representative of the employees in the drivers and yardmen unit during the year Union's certification year.

(c) Bypassing the Unions and dealing directly with unit employees concerning wages, hours and other terms and conditions of employment.

(d) Refusing to furnish the Unions with a requested copy of the merger agreement between Tyson and Holly Farms, allegedly necessary to enable the Unions to meet their bargaining responsibilities.

(e) Unilaterally, without notice to or bargaining with the Union, changing the absenteeism call-in

policy for employees in the live haul unit.

(f) Unilaterally, without notice to or bargaining with the Union, informing live haul employees that their pension plan would be terminated in 1 1/2 years.

4. Whether, in the context of the Respondents' unlawful conduct, the strike among the Respondents' drivers in the drivers-yardmen unit that began on October 1 was an unfair labor practice strike.

5. Whether, in the context of the above violations, the Respondents should be required to bargain with Local 391 with respect to live haul unit employees based on that Union's majority status as evidenced by signed union authorization cards.

6. In the alternative to issuing a bargaining order with respect to the live haul unit, whether the representation election in Case 11-RC-5583 should be set aside and a new election directed. Subordinate issues involved include:

(a) Whether supervisor Commie Johnson interfered with the conduct of the election.

(b) Whether the determinative challenge to Tony L. Clark's ballot should be sustained.

All parties were given full opportunity to participate, to examine and cross-examine witnesses, o introduce relevant evidence and to file briefs.[52] Briefs filed by the Gener-

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[52] The General Counsel's post-hearing motion to correct their brief was unnecessary (continued...)

al Counsel, the Charging Parties and the Respondents have been carefully considered.

Upon the entire record of these consolidated cases and my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

Respondent Holly Farms, a Delaware corporation with a facility in Wilkesboro, North Carolina, is engaged in poultry production and processing. During the 12 months prior to issuance of the consolidated complaints herein, representative periods, Respondent Holly Farms shipped from its Wilkesboro facility products

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[52](...continued)
as the brief was complete as originally submitted.

valued in excess of $50,000 directly to points outside the State of North Carolina.

Respondent Tyson, a corporation licensed to do business in the State of North Carolina, with a facility in Wilkesboro, North Carolina, is engaged in poultry production and processing. On about July 18, Tyson purchased a controlling interest in Respondent Holly Farms' stock and, since that date, has been engaged in the same business operations at the same location selling the same product to substantially the same customers and has as a majority of its employees, individuals who previously were employees of Holly Farms. Holly Farms Foods, Inc., and Holly Farms Food Services, Inc., are wholly-owned

subsidiaries of Holly Farms Corporation and Holly Farms Corporation is fully owned by Tyson.

The complaints allege, the answers, as amended at the hearing, admit, and I find, that Respondents Holly Farms and Tyson, respectively, are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organizations Involved

The Unions herein are labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background: Factual Overview

The Respondent Holly Farms, before July, was independently engaged in producing, processing and shipping poultry and related products. While

Holly Farms' principal and headquarters facility was in Wilkesboro, North Carolina, it had facilities at other points in the United States including Monroe, North Carolina; Glen Allen, Temperanceville and Harrisonburg, Virginia; and in Center and Seguin, Texas. The North Carolina and Virginia facilities comprised the Holly Farms Eastern Division, while the Texas facilities constituted the Holly Farms Western Division. Holly Farms, either directly or through its subsidiaries, operated hatcheries, live haul operations, feed mills, feed haul operations, maintenance facilities, and poultry processing plants. Product was moved between facilities for further processing or to customers by drivers in

the Holly Farms Transportation Department,[53] in which the above drivers-yardmen unit was included. As of September 12, Holly Farms, within the drivers-yardmen unit, employed 209 drivers, including extra-board, replacement drivers who did not have regular vehicle assignments, to operate about 170 tractors. Of these, around 120 were used for long haul operations and the remainder for local traffic. At the time of the March 9, 10 and 11 election in the drivers-yardmen unit, 299 drivers and about 45 yardmen were employed. The great majority of these employees were in the eastern division.

[53] Holly Farms had plants and terminals at all of the aforesaid locations except Glen Allen (Richmond), Virginia, where it only had a terminal, and Harrisonburg, where there only was a plant.

The Respondents' Wilkesboro complex, where much, if not most of the relevant events occurred, was the nucleus of the Holly Farms operations before July 18 when Tyson assumed control. After Tyson took over, this complex continued to function for approximately the next 2 months under the same managers and supervisors and with the same employees in essentially unchanged fashion, except for certain changes in the transportation department, which will be detailed below.

The complex' north side was the location of the main processing plant where caged live chickens, brought in by live haul employees[54] on trucks

[54] As will be discussed in greater detail, live haul employees consisted of chick- (continued...)

from the grow-out farms, were weighed and ultimately moved into the processing plant, where fresh chicken products were prepared. This structure was bounded on the east, across a company street, by the food service plant, also known as Convenience Foods which, among other things, produced fast and frozen foods. A large employee parking lot lay to the west of the processing plant. This lot, in turn, was partially abutted on the south by the cooked products plant

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[54](...continued)
en catchers and live haul drivers, who worked as members of crews. The chicken catchers would be transported to grow-out farms, where the chickens were raised, and manually caught and caged the chickens. Live haul drivers drove the chicken catchers to and from the farms and used flat bed trucks to move the caged chickens from the farms to the Wilkesboro complex scales and main plant receiving dock. After delivering each load to the complex, the live haul drivers would return to the farm for additional loads until the completion of their shifts.

which, inter alia, prepared factory roasted chickens, sold as fully cooked. The scales, scales office, live haul office, broiler service and live haul truck parking areas occupied the central areas of the complex. The transportation service buildings and parking areas for transportation department drivers were at the south and southeast corner, respectively. The complex, which employed about 2,500 employees, also contained various plant cafeterias, a retail store and additional company streets and parking areas.

The seven local unions in this matter began their organizing campaign on December 1, 1988, among the Holly Farms drivers and yardmen in that Company's above-referenced North

Carolina, Virginia and Texas facilities. Following an election on March 9, 10 and 11, the Unions were jointly certified on March 24 as bargaining representative for employees in that unit in Case 11-RC-5571.

In late December 1988, Local 391 began its separate campaign to organize the Holly Farms live haul unit employees. On February 16, Local 391 filed the petition in Case 11-RC-5583 for a representation election among employees in a much larger unit than that ultimately approved by the Board. During this unit-sorting process, the Regional Director, on March 27, dismissed the petition in Case 11-RC-5583 on the ground that certain of the employees sought, including hatchery workers, were exempt

from coverage under the Act as agricultural employees and because Local 391 had not expressed a desire to represent only those non-agricultural employees who were covered by the Act. However, in response to the Union's April 6 request for review, wherein it asserted that it would be willing to proceed to an election in any unit or units the Board found appropriate, the Regional Director, by Order, dated April 28, treated the Request for Review as a Motion for Reconsideration, reopened Case 11-RC-5583 and noticed the matter for hearing to obtain further evidence concerning the appropriate unit. On July 20, the Board granted Local 391's subsequent request for review of the Regional Director's determina-

tion that an election should be ordered for employees in two bargaining units, and directed that an election be conducted for the employees in the single above-described unit. The Union did not receive a majority of the ballots cast at the July 27 election. After the election, the Acting Regional Director sustained the challenges to the ballots of 6 of the 10 determinative ballots and overruled the challenges to 3 other ballots. Ultimately, this resulted in a tie vote and it became necessary to resolve the remaining determinative challenge—that of Tony L. Clark. Local 391 also filed timely objections to conduct affecting the results of the election. As noted, the issues concerning Clark's determina-

tive challenged ballot and the election objections were consolidated herein.

Following the Union's March certification as representative for the Holly Farms drivers and yardmen, representatives of that Company and the Union participated in a series of negotiating sessions, starting in April, to try to reach agreement on a collective-bargaining agreement. Although it is agreed that these negotiations were conducted in good faith, by July, after about 12 sessions, the parties had not yet settled the terms of a contract. Also in July, as Tyson's takeover of Holly Farms became imminent, negotiations were suspended at Holly Farms' sug-

gestion, pending clarification of the general situation.

When, on August 8, 9 and 10, contract negotiations for the drivers-yardmen unit resumed, Holly Farms' Attorney Jesse S. Hogg continued as Company spokesman, but with Tyson in control and its representatives present. At that time, the Respondents informed the Unions that drivers in what had been the Texas-based Holly Farms western division would be consolidated into the larger Tyson transportation system,[55] but that existing eastern transportation division would remain, except that it would be reduced by the layoff of 71

[55] At the time, Tyson's transportation department was about twice the size of that of Holly Farms.

drivers and the removal of 47 tractors.

The parties met again in late August when the Respondents gave the Unions copies of the Tyson wage and benefits plans, announcing their intention to apply them to the drivers unit employees.

At the last bargaining session, on September 12, the Respondents announced that they were rescinding their previously-stated plans to lay off the 71 eastern division drivers and remove the 47 tractors. Instead of these reductions in personnel and equipment, the Respondent declared that they were going to also merge the eastern division, with the western division drivers into the Tyson transportation system; that the Re-

spondents were immediately going to send letters to all drivers offering them employment with Tyson under the Tyson pay package and work rules;[56] that Holly Farms' job benefits would be continued for eastern division employees for 2 years in accordance with the Tyson/Holly Farms merger agreement;[57] that recognition was being withdrawn from the Unions; and that Holly Farms was prepared to bargain only with respect to the impact of these decisions to integrate, but not the decisions, themselves. The

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[56] As will be discussed, the Tyson pay plan was less remunerative than was Holly Farms' and, under Tyson, drivers wold [sic] be required to spend more time away from home on longer runs.

[57] The Respondents refused to grant the Unions' request for a copy of the merger agreement.

Unions protested and refused to negotiate impact.

On September 12, immediately after the meeting with the Unions, the Respondents sent letters to all Holly Farms drivers on Holly Farms stationery offering them employment as Tyson drivers under the terms and conditions of employment applicable to Tyson drivers, advising that those who did not accept the offer by September 22 would be deemed to have resigned. In the meantime, between September 12 and 22, members of the Respondents' management and supervision met with eastern division drivers at various facilities to describe the new proffered employment arrangement and to answer questions. After September 22, the Respondents also

undertook the announced comprehensive integration of Holly Farms into the Tyson organization. This process essentially was completed before the time of the hearing and was described in detail in the record.

Of the more than 200 Holly Farms drivers who received the Respondents' September 12 letters offering employment under Tyson's terms, 47 drivers elected not to accept and were deemed to have quit. On October 1, the drivers began a strike against the Respondents.

The General Counsel and the Unions contend that the 47 drivers who refused to work for Tyson on and after the September 22 deadline under the unilaterally changed employment terms offered were constructively dis-

charged in violation of Section 8(a)(1), (3) and (5) of the Act.

The parties have raised many issues and defenses in connection with this proceeding which will be topically addressed herein. Although not included in the foregoing factual outline, the General Counsel and Unions contend that before Tyson assumed control on July 18, Holly Farms had independently engaged in numerous violations of Sections 8(a)(1) of the Act affecting drivers-yardmen and live haul unit employees, respectively, and also had violated Section 8(a)(3) by conduct which allegedly included the discharge of four plant employees and the issuance of written warnings to employees who had been active on the Unions' behalf. After

Tyson's July 18 takeover, the Respondents, jointly and severally, are charged with further violations of Section 8(a)(1), (3) and (5) of the Act.[58] The foregoing factual outline, intended as an overview, does not refer to all alleged violations of the Act.

Accordingly, the General Counsel argues that the strike that began on October 1 among the Respondents' long distance drivers was an unfair labor practice strike caused by the Respondents' unlawful conduct. The General Counsel and Unions also assert that a bargaining order should issue requiring the Respondents to bargain with

[58] The General Counsel argues that Tyson, as successor, was responsible under the circumstances applicable here to remedy Holly Farms' alleged unfair labor practices.

Local 391 with respect to the live haul unit on the ground that the Respondents' unlawful conduct had caused that Union to lose the majority it once had had held, as evidenced by union authorization cards, and as such conduct had rendered unlikely a fair, free election in that unit.

As stated, the Respondents' positions and defenses will be considered under relevant topics.

B. Supervisory Issues

1. General conclusions

The complaints herein allege that, before Tyson's July 18 takeover, 30 individuals were Holly Farms supervisors and agents. The same 30 also were alleged as the Respondents' supervisors and agents after July 18, except that 3 new names were added—

those of Tyson's board chairman and chief executive officer, Don Tyson; and that Company's president and vice-president, industrial relations, respectively, Leland Tollett and Howard Baird.

The Respondents have variously amended their answers to admit that, with the exception of John Sloop,[59] all persons respectively alleged to be Holly Farms and Tyson's supervisors and agents exercised the authority and functions of supervisors and

[59] While denying that Sloop was a supervisor before September 25, when his alleged unlawful activities were to have occurred, the Respondents admit that, since that date, Sloop has been their supervisor and agent within the meaning of the Act. Sloop's pre-September 25 status will be considered below.

agents within the meaning of the Act.[60]

In accordance with the parties agreement, I find that the following individuals, who did not regularly or directly oversee live haul employees, were, at all material times, the Respondents' supervisors and agents, within the meaning of Section 2(11) and (13), respectively, of the Act: Blake Lovette, Curtis (Bob) Absher, David Hayes, David Fairchild, A. Gerald Lankford, Barbara Mathis, Marion McKinley (Al) Bare, Mary Barnes, Robert Pipes, Ronald Bell, David Eller, Jerry Blevins, Shelton Goddard, Gary Hamby, Murl Murphy,

[60] In agreeing to supervisory authority, the Respondents do not admit the accuracy of the respective job titles as alleged in the complaint. These will be provided as applicable.

Luke Roten, Raymond Strong, Harold Eller,[61] Ted Roten, Tommy Felts and Larry Church. Since Tyson's July 18 takeover, Don Tyson, Leland Tollett and Howard Baird also have been the Respondents' supervisors and agents within the meaning of the Act.

The Respondents, as noted, have maintained their position that live haul employees are not employees within the meaning of Section 2(3) of the Act because exempt as agricultural workers and that, therefor, supervisors over live haul employees, correspondingly, are not supervisors under the Act, although exercising the requisite authority, because they do

[61] Although a substantial number of persons referred to in this proceeding share like surnames, family relationships are not germane.

not supervise statutory employees. However, I am bound by the Board's decision in Case 11-RC-5583 that the live haul employees, in fact, are employees within the meaning of Section 2(3) of the Act. I, therefor, find that the following Respondents' live haul supervisors whom, the parties agree, otherwise have met the supervisory criteria of Section 2(11) of the Act, were the Respondents' supervisors and agents during the times relative to this proceeding: Ray Lovette, Commie Johnson, Dean Grimes, Donnie Jones, David Minton and Sam Whittington.

The Respondents deny that Charles Robert (Bob) Sebastian, manager of the Respondents' Wilkes Hatcheries, is a supervisor while admitting that

this authority would meet the criteria of Section 2(11) of the Act. Sebastian's status, which will be considered below in connection with the discussion of his alleged conduct, differs from that of the live haul supervisors, above, because unlike them, the Board, in Case 11-RC-5583, found that the hatchery workers who report to Sebastian were exempt as agricultural and excluded them from the unit.

Finally, in this regard, it will be necessary to determine whether, as the Respondents assert, Joseph Richardson, group leader of the receiving dock employees at the Holly Farms food service plant in Wilkesboro, was a supervisor and agent within the meaning of the Act. The parties

agree that Holly Farms had terminated Richardson for union activities before Tyson's arrival, and the principal issue concerning his termination is whether or not he was a statutory employee entitled to the protection of the Act when discharged.

2. The supervisory status of John Sloop

The parties have vigorously litigated John Sloop's alleged supervisory status as the complaint alleges that Sloop repeatedly engaged in conduct violative of the Act. The General Counsel and Unions, contrary to the Respondents, assert that, prior to June 25, while Sloop still was Holly Farms' driver-coordinator at its eastern transportation division, Wilkesboro, when his asserted unlawful conduct was to have occurred, he

was a supervisor within the meaning of the Act. The parties have stipulated that, after June 25, when promoted to Tyson's manager of safety and personnel, Wilkesboro, he became a statutory supervisor. Sloop had become driver-coordinator in 1979, having worked for Holly Farms as a long distance driver since 1962.

As driver-coordinator, Sloop participated in the driver hiring process, did pallet control, handled fuel accounts, prepared routing books to be followed by Holly Farms' drivers in making deliveries and performed other jobs. However, he did not dispatch drivers, handle their paperwork or, in the first instance, normally receive calls from drivers experiencing difficulties while on the road.

Such calls were made to the dispatcher.

Sloop testified that under hiring procedures adopted in 1987,[62] a committee scoring process was established to evaluate driver applicants. Under this method, David Hayes, Holly Farms' vice-president, transportation, would inform Sloop when it was necessary to hire a certain number of drivers and direct him to "pull" filed applications. Sloop usually took three times as many applications from the Company's files as there were vacancies to be filled and, after initially screening the applica-

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[62] Sloop was included in group of Company supervisors to receive a May 27, 1986, memorandum from David Hayes, vice-president, Holly Farms transportation division, requesting review of the proposed revisions to the driver application policy.

tions to remove candidates with bad driving records or who otherwise appeared unsuitable, Sloop would give them to Hayes for further review. A committee consisting of Hayes; Wilkesboro safety director David Granger; outhaul manager Barry Wood;[63] head dispatcher, Wilkesboro, Curtis (Bob) Absher[64] and Sloop, then rated the individual applicants. In doing so, the committee members afforded each candidate weighted points for a series of factors including, but not limited to, over-the-road driving experience, refrigerated trailer experience, safety traffic

[63] The outhaul manager booked outside carriers to make outhaul deliveries of Holly Farms products from Wilkesboro in place of Company-owned trucks.

[64] Absher was the immediate supervisor of drivers based in Wilkesboro.

violations, education, previous employment and attendance, personality and appearance. The committee voted a score for each which was recorded by Hayes. The applicants with the highest scores were selected in descending order for the available vacancies. With tie votes, Hayes decided who would be hired. Sloop participated as a full member of this committee, all of whose other members were managerial personnel and/or supervisors within the meaning of the Act, and his vote counted equally with those of the others.[65]

After the committee had evaluated various job applicants, it was

[65] After September 25, when Sloop became safety and personnel manager for Tyson, he personally took over what, under Holly Farms, had been the work of the entire hiring committee.

Sloop's function to call in those who had scored the highest and steer them through further processing. He would send the potentially successful applicants to the first aid department for initial physical examination by the Company nurse and then would give them road tests.[6] Sloop had the test forms typed indicating that the road tests had been given and his signature certified that applicants had passed. In grading road tests, driver-applicants either passed or failed. Sloop's road test evaluations did not recommend whether the applicants be hired and, in 10 years, only two applicants had failed to

[6] Only Sloop administered road tests, during which respective applicants, with Sloop as passenger, would drive 25 miles performing various truck maneuvers characteristic of a daily run.

pass. Nonetheless, no driver could be hired without having been successful on the road test.

After the road test, Sloop would send driver applicants for final physical examination by the Company physician and then to the safety director to be given U.S. Department of Transportation (DOT) tests and Company orientation. When the driver-hopefuls returned from the safety department, Sloop would send them to vice-president Hayes for interview. It was Hayes who told the successful candidates that they were hired. Sloop then would issue to the new drivers route directories, prepared by himself; a cargo lock; a credit card and a list of telephone numbers, before turning them over to the dis-

patchers. This ended Sloop's role in the hiring process.

Sloop attended managerial meetings on an average of every 2 or 3 months when invited because an area of his responsibility, such as pallet control or routing, was to be discussed.

From February until the July Tyson takeover, Sloop also was engaged in pallet control, which principally consisted of tracking the low wooden platforms on which loads were placed and on which all of Holly Farms' products were moved. Sloop would try to retrieve pallets that drivers did not bring back from deliveries. This required returning the receipts for the pallets to the customers who had issued them—done by mail or by sending the receipts with drivers.

Sloop, however, did not directly send drivers to pick up Company-owned pallets but would give the receipts to the dispatchers requesting that they to have the drivers do so.[67] It was not mandatory that drivers return pallets and, to Sloop's knowledge, no driver ever was disciplined for losing pallets or charged for a pallet shortage. Sloop never took action against any driver who failed to obtain pallets owed to Holly Farms.

Sloop's files relating to pallets, fuel accounts and drivers' road violations were stored in his 8 by 11 foot office furnished with a desk,

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[67] Sloop culled the pallet receipts from shipping tickets and filed the information as to where the pallets had been left -- in effect keeping records of which companies owed Holly Farms pallets, and vice versa.

filing cabinet, telephone and calculator. He did not have a secretary.

With regard to fuel control, Sloop, based upon his prior 17 years experience as a Company driver, but principally upon information obtained from questioning drivers, prepared a list of fuel stops for the drivers, revising this list during each year. Sloop also gave drivers a credit card widely-accepted in the trucking industry to be used for fuel purchases.

Drivers testified at the hearing that they had been required to use routes specified in a route book prepared and given to them by Sloop and that they were authorized to deviate from the selected route only in extreme situations, such as very bad weather. Driver Barry Gordon Foster

testified that Sloop also specified the routes to be used for backhaul. Drivers were paid on basis of the mileage available from the routes Sloop designated. A driver, whose name Foster could not recall, had been dismissed because he became involved in an accident while off the designated route. Driver Howard C. Eller testified that about 2 years before, he had found it necessary to speak to Sloop to obtain permission to change a designated routing which Eller considered to be extremely dangerous. Sloop, in turn, had consulted transportation vice-president Odell Whittington,[66] before responding. Eller was not certain whether

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[66] Odell Whittington preceded David Hayes as Holly Farms vice-president for transportation.

it was Whittington or Sloop who later authorized the suggested route change.

Sloop testified that there were routing directories—the Holly Pack Route Book for fresh chicken deliveries—and the Holly Farms Fried Chicken Directory. These books contained driver information compiled by him, indicating customers' names, addresses and directions to the customer locations. The Fried Chicken Directory listed approximately 600 customers and specific travel directions. As the shelf life of fried chicken is longer than that for fresh chicken, the fried chicken route book provided for multistop loads. There were not as many stops in the Holly Pack Directory, but both books established routes to be taken by direct drivers.

Sloop prepared the first such directory—for fresh chicken deliveries—in 1981, about 2 years after becoming driver-coordinator, at the direction of Vernon Church, then Holly Farms vice-president, transportation. Church worked with Sloop on the document and, when completed, Church approved its use. Sloop next assembled the separate fried chicken directory in 1984. Both route books were revised after six to eight new customers were obtained. To route drivers on interim bases during periods when less than six to eight new customers had been aggregated, Sloop would post handwritten directions on the drivers' bulletin board. Sloop

determined the routes to be used in consultation with the drivers who might suggest ways of traveling to new customers.

Responding to driver Foster's above testimony that a driver had been terminated for deviating from the prescribed route, Sloop related that, in 1983, a driver named Myers had had an accident while not following the directory routing and that Myers had been terminated because of the accident.

While the directories still were given to new drivers since Tyson assumed control of Holly Farms, the route books now serve merely as guidelines because Tyson has its own routing system in the form of computer printouts.

Sloop denied that, as driver-coordinator, he had authority to assign work, to transfer or promote employees, to grant pay increases, or to effectively recommend any of the above. He also denied having had any formal role in the adjustment of grievances. Informally, however, as his office had been in direct line from the drivers' parking lot to the transportation office, drivers stopped by to talk to him about their problems, and Sloop did tell drivers that he would mention their concerns to management officials. Beyond that, Sloop denied having any role in solving or answering drivers' complaints.

The evidence conflicts as to whether Sloop played a role in disci-

plining drivers. Donald Kanupp testified that, on June 1 while still a Holly Farms driver, he received a written logging violation for violation of the 70 hour rule, a U.S. Department of Transportation (DOT) time limit on truck operation, notifying him that such a discrepancy had been detected in the preparation of Kanupp's daily logs for May. The form directed Kanupp to report to Sloop as soon as possible and was signed by Sloop as "Company Official." Kanupp, however, testified that he had received the logging violation form on about June 1 from Sloop while they were alone. Sloop asked the reason for the violation on Kanupp's log—he was about 15 minutes over the permitted 70 hours. Kanupp

replied that the only thing he could figure was that he had just miscounted. Sloop entered Kanupp's explanation on the bottom half of the form and both men signed it. Sloop told Kanupp that this write-up for a logging violation would go in his file.

John E. Danner testified that in August 1986, he had attempted several times to deliver frozen products to a destination in Cincinnati, Ohio. However, the receiving agent repeatedly refused to accept the load. When Danner returned to that dock after having been reassured by the Holly Farms dispatcher that the matter would be straightened out, the receiver, accusing him of attempting to go over his head, again refused the load and asked Danner to leave

the premises. After Danner made a second call to the appropriate Holly Farms staff and a resultant third delivery attempt, the receiver called the Wilkesboro dispatch number and Sloop ordered Danner back. When Danner returned, Sloop told him that if that happened again, he would put a reprimand letter in Danner's file. Danner did not know whether a disciplinary note was placed in his file.

Gene Hester testified that in mid-August, he was present in Sloop's office when Sloop attempted to discipline driver John Thompson. According to Hester, Sloop had prepared a written warning, telling Thompson that he erred in completing his logs. Thompson replied that he did not want to change his logs as he felt that he

had prepared them correctly. Hester related that Sloop ultimately agreed that Thompson was correct and discarded the written warning, but told Thompson that the record of their conversation stood.

Finally, driver Robert Gwyn Wyatt testified that on March 3, in snow and ice, he had had an accident near Toledo, Ohio, in which his truck slid into a guard rail. Only Wyatt's vehicle was involved, the damage assertedly had not been serious and Wyatt had duly called his office to report the incident at the earliest opportunity.

According to Wyatt, about 4 or 5 days later, Sloop came into the drivers' room where several other drivers, including Wyatt, were talking.

Sloop told Wyatt that he should have been fired 100 times since he had been with Holly Farms. When Wyatt asked why, Sloop told him because of his driving record; the guard rail in Toledo had not flown up and hit him, had it? Wyatt answered no, but that that had been a weather-related incident and that he never had been charged with a weather-related accident. Sloop replied that a chargeable accident is anything the Company wants it to be. When the other drivers began to criticize Sloop, Sloop left the room.

Sloop explained that drivers were required to keep logs of all their activities while on the road—indicating their sleep time, driving time, off-duty time, etc., which in-

formation was noted by the log clerks when the logs are turned in together with the drivers' other paperwork. Sloop explained that records of logging violations were kept by the Respondents because of DOT regulations; DOT audited the Respondents' daily drivers logs and trip reports. Sloop testified that his only function in that area had been to make up and file logging violation forms. Sloop, not involved with DOT Audits, did not know whether DOT ever had asked to see violation forms. Sloop, however, admitted that DOT fined companies, and even drivers, for such violations.

When a logging violation, such as that recorded for Kanupp,[69] was called to Sloop's attention by the logging clerks, he would enter the violation on the appropriate form; discuss with the driver his reasons for the violation, noting the reasons on the form; and file the form, with a copy going to the employee's personnel file. Sloop testified that while he had responsibility for compiling logging violations, they had not constituted grounds for discipline. Only six such violation forms have been used.

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[69] Sloop essentially agreed with Kanupp's account of what had occurred when Kanupp was given his logging violation notice. However, Sloop maintained that he did not recommend further action against Kanupp because of this infraction. Sloop related that he had spoken to Kanupp at vice-president Hayes' request and had told Kanupp that the incident was no major violation but would be written up as a matter of record.

With respect to Hester's testimony concerning driver John Thompson, Sloop recalled that in August, Thompson, en route to his car parked just outside Sloop's office door, complained to Sloop that he was angry about not being dispatched fairly in that he was not getting as many trips as he felt entitled. Sloop, in turn, told Thompson that he had violated the 70 hour rule and asked him to sign the violation form. Thompson, repeating complaints about his lack of assignments, refused to sign anything. Sloop later reported Thompson's refusal to sign the violation form to Hayes who told him to write it up and to put it in Thompson's file without the latter's signature, which Sloop did.

As to the Wyatt incident, Sloop related that, in February, after the union campaign had started, he was passing through the drivers' room where several drivers, including Wyatt, were seated. All were praising the Union. Wyatt, who had had several accidents in the past, had just had another. After hearing Wyatt speak well about the Union, Sloop asked Wyatt how many times could the Company have fired him under a union contract. Wyatt answered maybe once or twice. Sloop retorted what did he mean once or twice? "We could have fired you a couple of weeks ago when you had that wreck on the ice." When Wyatt said that that was not chargeable, Sloop asked what Wyatt meant that it was not chargeable. How fast

had that guard rail been running when it hit him. Sloop described the exchange as just one big joke, relating that everyone laughed, that Sloop went on his way and that nothing more was said about the matter by himself or Wyatt.

Earlier, Sloop, on November 27, 1984, and October 5, 1988, respectively, had issued directive memoranda to "All Drivers" in his own name, without job title, outlining procedures to be followed by the drivers in certain situations. In the 1988 memorandum, Sloop noted that Holly Farms had made agreements with certain outside concerns to perform unloading services of products from two specified sources for delivery at two locations in Salem Virginia, at a

maximum charge for such loads of $75 regardless of load size. In this memorandum, drivers were instructed as to where to call for applicable unloading and who to call when running late. The 1984 memorandum detailed procedures drivers were to use when picking up pallets.

When, on September 12, the Respondents wrote to the drivers offering them jobs with Tyson, Sloop was referred to in the letters as to the party to whom to respond by the September 22 deadline.[70]

Sloop testified that, in 1986, at the request of outhaul manager Barry Wood, he accompanied Wood and chief dispatcher Bob Absher to the home of

[70] As noted, Sloop did not attain uncontested supervisory status until his September 25 promotion.

a driver for the purpose of terminating that employee for a specified infraction. Sloop related that his role was passive during that visit. While the driver was discharged on that occasion, Sloop merely had been present.

Sloop was salaried, as were members of management, including all who served with him on the hiring evaluation committee, while drivers basically were paid on the basis of their mileage. Sloop testified that management benefits were basically the same as those paid to drivers—company-paid long term disability and medical coverage,[71] life insurance and a noncontributory retirement

[71] Employees received medical coverage from the Company but paid to have such insurance extended to their spouses and families.

plan. When Sloop had become salaried in 1979, those benefits and his earnings were unchanged except that he received an extra $10,000 in life insurance coverage.

In 1989, prior to the arrival of Tyson, Sloop was not obliged to wear a uniform, but occasionally wore a coat and tie.

While Sloop, as driver-coordinator, lacked many of the supervisory indicia set forth in the disjunctively-construed Section 2(11) of the Act in that he could not, in Holly Farms' interest, independently discharge, transfer, suspend, lay off, recall, promote or reward employees, adjust their grievances, or effectively recommend such actions, I nonetheless find that while he held

that position he was a supervisor within the meaning of the aforesaid section of the Act.

A clear indicia of Sloop's supervisory status was his role as a full participant in the work of the committee that evaluated and effectively recommended driver-applicants for employment. There, Sloop cast votes equal to those by senior management and supervision. Except for Sloop, the supervisory status of all members of this standing committee was conceded, and on the basis of these votes, drivers were selected for hire. While Sloop's vote was only one of several cast concerning each applicant and while no one was hired in this process because of Sloop's vote alone, his votes in this setting

were counted as much as any of the involved supervisory personnel and his evaluations constituted structured, effective recommendations as to who should be hired. While Sloop's attendance at other types of management meetings were more irregular, based on whether any of his areas of responsibility were to be considered, the record reveals that Sloop's attendance at managerial meetings were not limited merely to those related to hire.

Sloop, however, had even greater involvement in the overall hiring process than did other members of the evaluation committee. When Hayes would begin the process by asking Sloop to "pull" driver applications, Sloop determined which of the many on

file would be selected for processing at that time. There was no requirement that this initial selection be random and the record shows that Sloop, in fact, did the initial screening before giving the applications to Hayes. After driver-applicants were graded by the evaluation committee, Sloop, more than others, participated in the further processing of high-scoring applicants, shepherding them to physical examinations and interviews and in administering, evaluating and certifying the prerequisite road tests. While Sloop's role in Holly Farms multi-faceted hiring procedures was subordinate to that of Hayes, no one else was more actively or responsibly engaged.

In addition to his ability to recommend the hire of employees as part of a supervisory panel, Sloop was afforded other indicia of special status. Unlike drivers, he was salaried; enjoyed job benefits somewhat superior to the drivers; had his own office; as Holly Farms representative, signed logging violations for which drivers could be subjected to DOT-imposed fines; prepared and distributed routing books which drivers were obliged to follow and which established fixed mileages to destinations on the basis of which the drivers were paid; orally and publicly reprimanded an employee for his driving accident record and, at the Company's request, accompanied supervisors to the home of an errant employ-

ee to witness that employees' discharge. After Tyson assumed control and while Sloop still was driver-coordinator, Holly Farms' drivers were directed in writing to notify Sloop by a date certain whether they would accept employment with Tyson under changed terms.

From the foregoing, I find that Sloop, when driver-coordinator, was a supervisor and agent within the meaning of Section 2(11) and (13), respectively, of the Act, as he could effectively recommend hire. I, in any event, find that the Respondents had cloaked Sloop, while driver-coordinator, with sufficient apparent authority for him to have been reasonably regarded by employees as an

agent of management for purposes of the unfair labor practices herein.[72]

C. Events Occurring Before Tyson's July 18 Takeover

1. The alleged Section 8(a)(1) violations affecting the drivers-yardmen unit—facts and conclusions

(a) By John Sloop

John C. Danner[73] testified that on January 21, he went to driver-coordinator John Sloop's office to report an accident. After making his report, Sloop asked how he felt about the Union. Danner told Sloop that,

[72] G.T.A. Enterprises, Inc., d/b/a "Restaurant Horikowa," 260 NLRB 197, 203; J.P. Stevens and Company, Inc., 243 NLRB 996, 1000-1001.

[73] Danner was employed by Holly Farms as a long distance truckdriver for about 3 1/2 years before testifying at the hearing. He continued to work in that capacity for Tyson.

as he knew,[74] Danner supported the Unions. Sloop declared that he guessed that Danner knew that if the Unions came in, Holly Farms president Blake Lovette would sell all the trucks, do away with the transportation division and that everyone there would be terminated.

Sloop's recollection of the incident was poor. He remembered that in January, Danner, an outspoken union supporter, had come to his office on his own initiative and had spoken to Sloop about the Unions, what they were going to do for the drivers; and, in non-specific terms, what they were going to do for Sloop. Danner

[74] The Unions earlier had named Danner in a letter to the Company listing the names of the employees who were members of its in-plant organizing committee. Sloop had seen this correspondence.

had referred to the number of drivers who were going to vote for the Union in the coming representation election and suggested that Sloop, too, might want to cast his ballot for the Unions. Sloop initially could not recall anything have been said either by Danner, or by himself, about reducing the size of the Company's tractor fleet, but then denied that, at any time before the election, he had stated to employees that the Company would sell off its tractors or that jobs would be lost.

I credit Danner's account of this conversation. His recollection of the specific conversation was clear, he was a more forthright than was Sloop and, as will be discussed, Sloop's conduct, as described by Danner, was consistent with an extensive pattern of Company threats. However, Sloop's interrogation of Danner as to how he felt about the Unions was not violative of the Act since Danner was a known union supporter.[75] I find that the Respondents violated Section 8(a)(1) of the Act both by threatening that if the employees selected the Union in the coming representation election, the Company would sell off its trucks,[76] and the transportation division employees all would lose their jobs.[77]

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[75] Rossmore House, 269 NLRB 1166, enfd. 706 F.2d 1006 (C.A. 9, 1985).

[76] Hood Industries, Inc., et al., 248 NLRB 597, 600, supplemented 273 NLRB 1587.

[77] Harrison Steel Castings Company, 293 NLRB 1158, 1168-1169.

Transportation department driver Harden Branscome testified concerning two conversations with Sloop in the period before and during the drivers' election, held on March 9, 10 and 11. In February, about 2 weeks before the voting, Sloop called Branscome and some other drivers into his office and told them that if the Company won the election, the Company, within 6 months, would get rid of all of the trucks and the drivers would lose their jobs. There was no response to this.

According to Branscome, on March 10, one of the days when the election was conduced, he encountered Sloop who invited him to his office. There, Sloop told Branscome that the Company was going to win the elec-

tion; that after the Teamsters went back to Kernersville,[78] the Company was going to start solving some of the employees' problems. Branscome conceded that it would be fair to call his March 10 conversation with Sloop a "debate" in that Branscome, a known union supporter, had discussed the Unions with Sloop on several occasions.

Gene Hester, a long distance Holly Farms driver, testified that in late February, he had stopped by Sloop's office to chat. While there, Hester complained about the excessive waiting time experienced at destina-

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[78] Local 391 is based in Kernersville, North Carolina.

tions.[79] Hester also told Sloop that the Unions were going to win the election. This statement by Hester about the Unions' election prospects was part of an ongoing, friendly and frequent discussion between the two men and Sloop then was well aware of Hester's pro-union stance. Sloop, however, told Hester that there was no way the Unions were going to win the upcoming election and, if the Unions did win, they all would be out of jobs—"All of us would be out of a job." Also during that conversation, Sloop told Hester that if the employees would send the "S.O.B.'s" back to

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[79] Drivers' waiting fees, compensation for time spent at customers' facilities waiting for unloading and for backhaul loads, were substantially reduced in December 1988. Drivers, at that time, had been expected to contact Sloop with questions concerning waiting time.

Kernersville and air their grievances with (Holly Farms president) Blake Lovette, they could work it out themselves. Sloop concluded that if they did not do this, they all were going to wind up without jobs.

Sloop's response to the above-described testimony of Branscome and Hester essentially was to make the same generalized denials that he had entered with respect to Danner—that he had known at the time of the conversations that Branscome and Hester both were avid union supporters but that he had not made any statements threatening the loss of jobs if the employees selected the Union. Sloop did not refer to any particular conversation with either drivers.

In evaluating the respective testimony, I credit the more specific detailed accounts of Branscome and Hester as to what Sloop told them on the occasions in question. While the record, as it will be developed, shows that Hester and Branscome were closely associated in certain aspects of their union activities and had ample opportunity to put together similar stories concerning Sloop, the record also will establish that considerable unlawful conduct was directed against both men by other Company supervisors, increasing the prospective accuracy of their more precise accounts of what took place on the described occasions. Also, the cordial relationship between Hester and Sloop lessened the likelihood

that Hester would portray Sloop in undeservedly negative terms.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by Sloop's conduct in telling Branscome that if the Company won the election, all the employees would lose their jobs; by Sloop's statement to Hester that if the employees won the election, the employees all would lose their jobs; and by promising Branscome and Hester that if employees, in effect, got rid of the Union, the Company would resolve the employees' grievances.[80]

The General Counsel again referred to the incident, more fully described above in connection with the discus-

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[80] NLRB v. Arrow Molded Plastics, Inc., 653 F.2d 280, 107 LRRM 3332, 3334 (C.A. 6, 1981).

sion of Sloop's supervisory authority, where, shortly after driver Robert Gwyn Wyatt's March 3 accident in slippery weather, Sloop had criticized him before a group of other drivers in the drivers' room, as a threat of unspecified retaliation in violation of Section 8(a)(1) of the Act. Sloop, referring to the accident, had told Wyatt on that occasion that he should have been fired 100 times since he had been with the Company because of his driving record and that the accident, although occurring in icy conditions, could be chargeable, although, as Wyatt had protested, accidents that took place in such conditions usually were not. Sloop related that he had so spoken

to Wyatt after hearing him and the others praise the Union.

Wyatt further testified that earlier, in late February, Sloop beckoned to him as he was walking across the parking lot. Sloop was on the lot with since-retired driver Claude Whittington. When Wyatt walked over, Sloop asked why don't we form a committee and do away with and forget about the Union? We will form a committee and sit down and talk about our problems. Forget about the Union. Wyatt replied that he did not like the idea of a committee because anything the committee might agree to would not be binding on the Company. Sloop told Wyatt that if the Union is voted in, in 6 months we'll all be gone. Wyatt responded, "Well John,

I'll tell you. If you've done your job, you ain't got no problem. If you ain't done your job, you shouldn't have your job anyway." Sloop told Wyatt that he could retire; he was better off than and would not be affected like some of the rest.

Sloop remembered the parking lot incident involving Wyatt as having taken place in late February or early March as he and Claude Whittington were agreeing that they did not need a union and that what they should do is form a committee through which they could discuss their problems. When Wyatt joined them, they suggested to him that the drivers should form a driver-management committee. Wyatt had told them that if they did

not get a union in there, none of them would have a job. Sloop replied that he did not want to do that. Sloop denied that there had been any argument between himself and Wyatt on that occasion or that he had said words to the effect that, if the Union came in, employees would lose their jobs; that he had referred to a period of 6 months; or that Wyatt had told him that Sloop would not have to worry about his continuing to have employment if he did a good job. Whittington did not testify.

Again, I would credit Wyatt's account of his conversations with Sloop. From Sloop's own testimony, it can be found that he had criticized Wyatt in the drivers' room because Wyatt, at the time, had joined

in verbally supporting the Unions. Wyatt's testimony that Sloop, during their parking lot conversation, had told him, among other things, to forget the Unions and join in forming an employees' committee to negotiate with management, does not differ greatly from Hester's above account of Sloop having advised him that if the employees abandoned support for the Unions and the Company would resolve all their grievances. Such statement was a Company promise to resolve the employees' grievances if they would stop supporting the Unions. Wyatt's description also is consistent with what Sloop, as found here, told a number of drivers—that if they selected the Union, their jobs would be lost.

From the foregoing, I find that the Respondents violated Section 8 (a)(1) of the Act by Sloop's conduct in threatening Wyatt with unspecified reprisals, in the context of Wyatt's pro-union discussion with the drivers, by telling Wyatt that he could have been fired 100 times because of his driving record; by having told Wyatt in the parking lot that if the Unions were voted in, the employees would lose their jobs;[81] and by telling Wyatt, in Whittington's presence, to forget the Unions and join in forming a committee to negotiate with management over working conditions.[82]

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[81] Jay Foods, Inc., 228 NLRB 423, 430.

[82] American Display Manufacturing Co., Inc., 259 NLRB 21, 32.

Long distance driver Barry G. Foster testified without contradiction that in early April, after the Unions were certified as bargaining representative for the drivers-yardmen unit, Sloop told Foster in the drivers' room that the Company wanted to sign a contract with the Unions. Foster replied that that was fine; it was what the drivers wanted. Sloop, however, went on to say that the way the Company was willing to do this would be to sign a contract for 1 year, with the drivers continuing to earn the same as they had been. Foster told Sloop that that would not work; the drivers did not want it that way. Sloop replied that that was the only way the Company would sign a contract.

In agreement with the General Counsel, I find that the Respondents violated Section 8(a)(1) of the act by Sloop's above statement to Foster when negotiations for a first collective-bargaining agreement were beginning, to the effect that the Company would not sign a contract containing a pay raise in that such statement indicated it would be futile to select the Unions as bargaining agent.[83]

(b) By Murl Murphy

Terry Layman, a truckdriver, testified without contradiction that in late December 1988, his dispatcher and supervisor, Murl Murphy, gave him an envelope with his name on it.

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[83] E. I. DuPont de Nemours, 263 NLRB 159, 165.

When Layman opened it in Murphy's presence, a union authorization card fell out. Murphy told Layman that he hoped he did not find out who had sent this to him. Layman did not answer and Murphy continued that he thought he probably knew who had sent the card to Layman.

I find that by Murphy's comment to Layman that he hoped he did not find who had sent the authorization card to Layman, the Respondents violated Section 8(a)(1) of the Act by Murphy's threat to Layman that he would take unspecified reprisal against another employee, whose identity he may have surmised, for engaging in union activities.[84]

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[84] See Benmit Division, U.S. Tubular, Inc., 280 NLRB 710, 715, where the Employer, (continued...)

(c) By Blake Lovette

Blake Lovette[85] testified that he first became aware of the Unions' organizing activities in the Holly Farms transportation division on December 24, 1988. On January 4 through 6, he met with drivers at Company facilities in Wilkesboro and Monroe, North Carolina; Glen Allen, Temperanceville and Harrisonburg, Virginia; and Center and Seguin, Texas. At each of these meetings, Lovette delivered the same speech,

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[84](...continued)
inter alia, analogously had threatened to find out who signed authorization cards.

[85] Lovette, president of Holly Farms Food, Incorporated, a wholly-owned subsidiary of Holly Farms Corporation, since February 1988, after the merger became general manager and senior vice-president of the Tyson Foods Fresh Retail Division. As such, Lovette continued to be responsible for production, sales and marketing of Holly Farms and also Tyson brands fresh chicken products.

verbatim, to a total of about 180 drivers. This speech, in relevant part, contained the following language which, the General Counsel and Union argue, constituted an unlawful threat to discontinue the Holly Farms trucking operations if the employees should select a union to represent them:

> If we felt felt that we should contract out our hauling, we would have the right to propose that, too. And you may know that that is exactly what some of our competitors do.
>
> * * * *
>
> I am just telling you that no union could prevent us from reducing pay or benefits, or from going to outside contractors to haul product, or to do anything else that we do, if we in good faith thought that we had to do that for sound business reasons.

However, in the passage marked by the above asterisks and not referenced in the General Counsel's brief, Lovette's speech also contained the following:

> Now, I am not making any predictions. I am not telling you we would contract our hauling out if you brought a union in here. The truth of the matter, I prefer that we do our own hauling, union or no union, as long as we can do it and it's good business for us to do it.

I find that the above disclaimer neutralized any threat in the January speech to contract hauling should the employees choose the Unions and that the disputed passage was not unlawful.

However, on about February 18, Lovette delivered a second verbatim speech to drivers at the same loca-

tions as in early January in which he again addressed the matter of using outside carriers in the context of the Unions' organizing campaign. In this February speech, Lovette told the drivers:

> Well, we have talked a lot about poultry companies going to contractors to haul their product. We considered that back in December, and decided against it. . . . But I also told you that contracting the hauling is an option we have and will continue to have. As soon as word of this union situation got out, we got calls from people interested in buying our tractors and contracting to haul our product for us. I found out right quick it wouldn't be any problem to sell every tractor we own at a good price. And it wouldn't be any problem to hire contractors to haul our product.
>
> There is no good reason, then, for us to pay a non-competitive cost to haul our own product just be-

> cause some union should ask us to. Let me put it in plain and simple words. If you should bring this union in here to represent you, and if this union demanded a pay or benefits plan that we in good faith considered to be unsound and unjustifiable from a business point of view, there is nothing to prevent us from making a decision to sell our tractors and contract out our hauling. We might have to negotiate about the impact of that on our drivers, but would not be a problem.

The U.S. Supreme Court has stated in N.L.R.B. v. Gissel Packing Co:[86]

> . . . an employer is free to communicate to his employees any of his genera views about . . . a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.' He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a

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[86] 395 U.S. 575, 618-619 (1969).

case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probably consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. See Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 274, n. 20 (1965). If there is any implication that an employer may or may not take action solely on his initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment. We therefore agree with the court below that (c)onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof. 397 F.2d 157, 160.

> As stated elsewhere, an employer is free only to tell 'what he reasonably believes will be the likely economic consequences of unionization that are outside his control, and not threats of economic reprisal to be taken solely on his own volition.' N.L.R.B. v. River Togs, Inc., 382 F.2d 198, 202 (2d Cir. 1967).

As further interpreted by Administrative Law Judge Roth in his Board and Court-approved decision in Blue Bird Body Company,[87] "employees because of their economic dependence on the Employer tend to 'pick up intended implications . . . that might be more readily dismissed by a more disinterested ear,' . . . the employer's statements must be carefully phrased on the basis of objective fact and

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[87] 251 NLRB 1481, 1488, enfd. 677 F.2d 112 (C.A. 11, 1982).

. . . the employer must bear the responsibility for any misleading ambiguity on his part."

Applying the above authority, I find that Lovette's February speech to employees describing how readily the Respondent would and could sell its tractors and contract out the drivers' unit work should they select the Unions to represent them, did not constitute an objectively-stated prediction of events beyond the Respondent's control, but was a coercively presented list of options available at the Respondents' whim should collective bargaining, in management's judgment, become bothersome or inconveniently expensive. In the atmosphere created by the Respondents' other unlawful conduct found herein,

I find that Lovette's February speech had even a more aggravated tendency to coerce employees."[**] I therefor, find that Lovette's February speech unlawfully threatened employees that the Respondents would sell the tractors they drove, contract out their work and take away their jobs if they should choose the Unions as their bargaining representative, all in violation of Section 8(a)(1) of the Act.

Long distance driver Gene Hester testified that, in February he went to Blake Lovette's office to personally deliver a letter from R. V. Durham, president of Local 391, challenging Lovette to debate him. The

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[**] Harrison Steel Castings Company, 293 NLRB 1158, 1159.

envelope was sealed with the Teamsters' emblem. When Hester handed Lovette the envelope containing the letter, Lovette told him that the postman usually delivered his mail, and threw the envelope to the floor. Hester picked it up and told Lovette that he wanted to talk to him about the drivers' pay. According to Hester, they then spoke for about 30 minutes, basically about compensation and certain recent Company measures that had reduced same. However, as their talk wound down, Lovette declared that he had a company to run and that he did not have time for such stuff as this Union. Lovette declared that if Hester would help him, he could win the campaign. He also told Hester, who had explained

about the pay cuts[89] and how the cost of living was rising, that he was a businessman and was not interested in people who only were interested in numbers. Lovette declared that there would not be a union at Holly Farms and, if the employees voted for representation, he would sell the trucks. During this conversation, Hester announced that because of the pay cuts, he was not interested in continuing to drive a truck. Lovette answered that he understood that there were some better positions open with Holly Farms. Hester told Lovette that he was not interested.

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[89] In 1988, Holly Farms had reduced drivers' compensation by substantially lessening what they were paid while waiting at customers' premises to be unloaded or for a different load for backhaul delivery. Fees for recovering pallets were eliminated.

Lovette recalled that the conversation with Hester had occurred on March 1 at about 11 a.m. Hester appeared at the reception area when Lovette was busy with telephone calls. After about a 30 minute wait, Lovette welcomed Hester into his office. As Lovette rose to shake hands, Hester handed him a letter displaying the Teamsters logo. Lovette stated that after he had dropped the letter onto the corner of his desk, it accidentally fell on the floor. He did tell Hester that the postman usually delivered his mail. Hester, who had sat down, suggested that Lovette read the letter. Lovette replied that he would wait to get it from the postman.

Hester told Lovette that if he wanted an end to this business, Lovette would have to rehire a former transportation manager named Lowe. Lovette replied that that would not be possible.

During their talk, Lovette informed Hester that his own job at Holly Farms had been very specifically spelled out by those who had hired him. Lovette was to get the Company profitable, efficient and competitive within the industry and that no division, specifically the transportation division, would be overlooked in those efforts. The result of the coming representation election would have no bearing on this. Lovette stated that he would work in all ways to make the transportation department

more efficient and that his options would remain open even after the election. If the Unions won the election, Lovette would have to bargain with them concerning the impact that any of his decisions might have on the drivers, but he still would have the right to haul his chickens in the most efficient way, retaining the options of selling his trucks and contracting his hauling if those ways were the most efficient.[90]

Lovette related that he told Hester that Holly Farms was a very good place to work. It provided good

[90] Lovette explained that his reference, during his conversation with Hester, to being able to sell all the trucks and to contract out hauling was not based on the then-current union campaign but on the premise that Holly Farms' conduct of its operations would not really be changed by the presence or absence of a union and that the use of contract carriers was an option available at any time.

wages and benefits. Lovette wanted to get this business behind him and get on with making good chickens and selling them well and competitively. Lovette expressed the hope that the drivers would not encumber him by bringing in a union. He described that meeting of about 15 minutes as his only one with Hester from January 1 through the time of the election. Lovette did not deny Hester's testimony that, during that conversation, he had told Hester that there would not be a union at Holly Farms; that he had asked Hester's help to enable him to win against the Union's campaign; and that, when Hester had protested the pay cuts and had stated his disinterest in continuing to

drive for Holly Farms, Lovette had offered him other work.

From Hester's undisputed testimony, I, therefor, find that Lovette's statement that there would not be a union at Holly Farms violated Section 8(a)(1) of the Act because an unlawful expression of the futility of supporting the Union.[91]

I conclude that the Respondents further violated Section 8(a)(1) of the Act by Lovette's statement, in effect, that whether the Unions won or lost the election, he had the option of selling all the trucks and contracting out hauling.[92] As the

[91] These expressions are similar to those found unlawful above in Lovette's February speech to employees.

[92] Jays Foods, Inc., 228 NLRB 423, 430, enfd. as modified 573 F.2d 438 (C.A. 7, 1978), cert. denied 439 U.S. 859 (1978) (continued...)

offer to find other work for Hester in the context of Lovette's request for his assistance against the Unions was not alleged as an unlawful inducement, I make no finding in this regard.

(d) By Curtis (Bob) Absher

Long distance drivers Teddy Ray Hayes and Harden Branscome testified to a late February conversation with head dispatcher Bob Absher. Both drivers had just returned from a trip taken together. While Hayes was completing his logs, Branscome spoke to Absher through the dispatchers' window about the forthcoming union election. Branscome told Absher that he

[92](...continued)
(threat to sell trucking operation); SMCO, Inc., 268 NLRB 1291, 1293 (threat to subcontract unit work).

was so certain that the Unions were going to win that he would quit if they lost. Absher replied that he was real sure that the Company was going to win and that, if it did, the trucks would be gone from Wilkesboro within 6 months. The Company, Absher continued, would use all the outside trucks they could to get away from having to use Company trucks.

Absher explained that he had known Branscome for about 10 or 12 years, that they had been good friends for several years and that, during the first months of 1989, Branscome had been coming to the drivers' room[93] where, in friendly fashion, he would

[93] The drivers' room, separated from the dispatching office by a half-door, was used by drivers to finish their paperwork—for signing in, picking up bills of lading and completing logs.

tell Absher, "We're going to win," and Absher customarily would reply, "No, you're not going to win." Absher recalled that on one occasion in late February, Branscome came in and, as usual, told Absher that we're going to win. Absher told Branscome that he did not think that they were going to win, adding that "They are going to use you for a scapegoat." Branscome replied that he would stay with the Company until the Unions won and then he (Branscome) would be out.

Although Absher testified that although he had been asked by the Company before the start of union activities to increase the use of outside carriers, he denied having said anything to Branscome about whether the Company was going to keep or get rid

of its tractors; whether it was going to increase the use of outside carriers or whether it was going completely to the use of contract carriers.

While, as argued by the General Counsel, the testimony of Branscome and Hayes concerning what was said by Absher is mutually corroborative, both men, as noted, were closely associated in their union activities, with each other and with Hester, suggesting the possible absence of spontaneity in their testimony. However, from Blake Lovette to John Sloop, I have found repeated references by responsible Company representatives to the possibility that, whether or not the Unions won the election, the Company would sell its trucks and contract its hauling operations. In

this context, I find that Branscome and Teddy Ray Hayes are corroborated by the general evidentiary pattern and I credit their testimony. I, therefor, find that the Respondents violated Section 8(a)(1) of the Act by Absher's statement to Branscome, in Hayes' presence, to the effect that if the Company did win the coming representation election, that the Company would stop using its own trucks and completely replace them with trucks owned by outside carriers. Even if Absher's statements to Branscome, overheard by Hayes, were made in the context of a friendly relationship and in the form of an opinion held by Absher, hi remarks nonetheless were coercive because made by an acknowledged supervisor

who professed to speak from knowledge.[94] In addition, the fact that Absher and Branscome were personal friends only served to enhance the impression that Absher was speaking on management's behalf.[95]

(e) By David Hayes

Long distance driver John E. Danner testified that, in late February, while he was in the drivers' room waiting to be sent out, David Hayes, Holly Farms' vice-president for transportation, asked to speak with him privately. Accordingly, after the two men had stepped onto the back porch, Hayes told Danner that he knew that his name was listed among the

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[94] Harrison Steel Castings Company, 293 NLRB, supra, at 1168.

[95] Colorado-Ute Electric Association, Inc., 295 NLRB No. 67 (JD 30).

members of the Unions' organizing committee.[96] Danner agreed that this was true. Hayes asked if Danner realized that this was serious. Danner replied that he did and thought that that was something the employees needed. When Hayes disagreed, Danner asked him, for argument's sake, to state his views. Hayes declared that Danner knew that if the election went through and the Unions should come in, Blake Lovette will disband transportation, remove all the trucks and all the drivers will be terminated. Danner answered that he did not think

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[96] As noted, the Unions previously had sent the Company a letter, dated December 28, 1988, the first of a series of four, identifying Danner and others as employee members of their in-plant organizing committee. Hayes also knew Danner to be a union activist since January from newspaper stories quoting Danner on the subject.

the Company could do that—not under federal law.

David Hayes, in turn, recalled that in December 1988, Danner came to his office holding a recently distributed copy of a pay change notice. Danner declared that while he knew that Hayes had had nothing to do with the change in pay he was disappointed in it. Hayes spoke to Danner about Danner's last trip. Nothing during that conversation was said about the use of outside carriers. Hayes testified that that was his last conversation with Danner and that there was no other occasion when he and Danner spoke about the Union and the representation election.

Danner impressed me as being a forthright witness whose testimony is

entitled to additional weight because of the risk he had taken in testifying against his Employer's interest while he continued to work under Hayes.[97] Also, Hayes' threat that, should the Unions win the election, the Company's trucks would be sold and that outside carriers would be retained to do the hauling is consistent with a series of like statements made to a range of employee witnesses by a variety of Company supervisors. I, therefor, credit Danner's account and find that the Respondents violated Section 8(a)(1) of the Act by Hayes' threat to Danner that should the Unions win the election, the Company's trucking operations would be

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[97] See Rodeway Inn of Las Vegas, 252 NLRB 344, 346; Gold Standard Enterprises, Inc., 234 NLRB 618, 619.

discontinued; the trucks removed; and the transportation employees terminated.[98]

William F. Johnson, a long distance driver for Holly Farms based at Glen Allen (Richmond), Virginia, testified that, in mid-February, he and other employes attended a meeting with Holly Farms officials Blake Lovette, president; David Hayes, vice-president for transportation; A. Gerald Lankford, vice-president for human resources; and Pete Lovette, treasurer.[99] During the meeting, Lankford told the employees how much more money they could be making, explaining that if the Company removed

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[98] Jays Food, Inc., 228 NLRB, supra, at 430.

[99] Pete Lovette formerly had headed Holly Farms' transportation division.

four trucks from the plant, the remaining drivers could obtain much better mileage and, thereby, increase their earnings.

Johnson related that on April 16, after the election, having just returned from a trip, he asked Raymond Strong, a dispatcher,[100] if he was going to get back out that night. When Strong said no, Johnson asked why, indicating that four trucks were being loaded outside. When Johnson finished his paperwork at about 1:30 p.m., he called David Hayes and reminded him that the men had been told in February, that if four trucks were taken out of operation, the remaining drivers would get more mileage and

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[100] Strong's supervisory status is admitted.

money. Hayes remembered this, but told Johnson that he had gone his way and joined the Union anyway. Accordingly, Hayes had to have some trucks to cover himself. Johnson asked if that was all that Hayes had to say. When Hayes started to say something else, Johnson hung up.

Hayes recalled that on April 16, Johnson had phoned him at his Wilkesboro office, telling Hayes that he had run trips that week of about 130 miles each and that he could not live off the proceeds of such mileage. Hayes replied that the Company was doing all it could, was trying to get him more miles and asked for more time. Johnson retorted that he did not believe Hayes. Hayes related that this was followed by about 10

minutes of discussion centered around Johnson's complaint that, in spite of the Company's February promise and the layoff of certain Richmond drivers, the remaining Richmond drivers had not received any additional mileage. Hayes, in turn, outlined various measures that the Company had taken to obtain more business, including where it had picked up new accounts. He tried to assure Johnson that the Company was trying everything, even to the point of having laid off drivers in Glen Allen, Temperanceville and Wilkesboro, in order to create additional mileage for the remaining drivers.

When Johnson told Hayes that he did not believe him, Hayes answered that he was sorry, but if Johnson had

patience, Hayes was sure that the situation could be turned around. Johnson declared that the drivers were not going to stand for this. Hayes, interpreting this statement as a drivers' strike threat, informed Johnson that if the drivers did strike, the Company would continue to do business and use outside contractors. When Johnson asked if that was it, Hayes said yeah. Johnson hung up abruptly.

I credit Johnson's account of his April 16 conversation with Hayes. As argued by the General Counsel, descriptions of this conversation by both Hayes and Johnson are similar, except that Hayes' account does not contain the controversial statement charged by Johnson to the effect that

Hayes had told Johnson that he was not receiving longer trips, more mileage and more money because he had joined the Union. Johnson impressed me as a candid, if not particularly benign witness who did not oppose the layoff of other drivers if that could result in more work for himself. Johnson's basic question to Hayes was that if, as promised, greater mileage could be made available to the remaining drivers by the layoff of other drivers, where was his share of the resulting extra work? Since such a position does not cast the proponent in a particularly favorable light, it is less likely that it would be told if not true. Accordingly, I find that the Respondents, through Hayes, violated Section 8(a)

(1) of the Act by retaliating against Johnson for having joined the Union by not providing promised additional mileage.

In assessing Hayes' general credibility, I note that in a speech delivered during the week of January 13 to groups of Holly Farms drivers, successively, at Wilkesboro, Monroe, Glen Allen, Temperanceville and Harrisonburg, he made the following statement at a time when, by his own testimony, he was actively espousing reductions of the Holly Farms truck fleet, had already made two such reductions and was contemplating additional cutbacks:

> I heard them [Holly Farms drivers] . . . . talking about these independents being a sorry bunch, and so on, and how much better off company drivers are. I

> agree with that, and I certainly prefer to run our own equipment, with our drivers. If Holly goes to outside contractors, I stand to lose my job.

While hyperbole is to be expected in pre-election propaganda, Hayes' above-exemplified misrepresentation to defeat the Unions was sufficiently excessive to weight adversely upon his credibility.[101]

(f) <u>The no access/no solicitation rule at the parking lots and related incidents</u>

(i) The threats to arrest employees

Long distance drivers John E. Danner and Robert Gwyn Wyatt testified that on April 3, after the Unions had been certified as bargaining repre-

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[101] The General Counsel, in their brief, do not argue, and I, from review of the text, do not find that Hayes' hard-line speech to employees during the week of January 13 violated Section 8(a)(1) of the Act.

sentative for the drivers-yardmen unit employees but while organizing efforts still were in progress among live haul unit and plant employees, they and driver Dennis Lackey were in the middle of one of the parking lots at the Holly Farms Wilkesboro complex passing out union literature to employees leaving work at the main plant and at the nearby Food Service (Convenience Foods) facility. Wyatt, without contradiction, denied that he and the two others had obstructed traffic or had interfered with the Respondents' business. At around 2:15 p.m., after they had been on the lot for about 15 minutes and had handed out a few handbills, a Company security guard approached and asked what they were doing. Whey they explained, the guard told them that Gerald Lankford[102] had said they all would have to leave. As off-duty employees, they had no business on Company property. Wyatt protested that they had a legal right to do what they were doing. The guard left and in about 10 minutes returned with another security guard and a city policeman. The policeman told the three men that Lankford had said that they were trespassing and that they would would have to leave the Company's property or he would arrest them. The employees were not allowed on Company property during non-work time. The three men decided to leave

[102] As noted, Lankford, at the time, was Holly Farms vice-president for human resources.

rather than to face arrest and, possibly, jail.[103]

(ii) The arrests of three employees

Drivers Gene Hester, Teddy Ray Hayes and Harden Branscome related, in this synthesized account, that on that same day, April 3, they, too, were in another parking lot of the Wilkesboro complex also to distribute union literature to employees as they left work. The three men had positioned themselves about 10 feet from the main plant door. At that time, about 2 p.m., the shift was about to end and the men, in fact, did give handbills to some emerging employees.

Soon thereafter, a Company guard approached and asked if the three men

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[103] Differences in detail between the descriptions by Wyatt and Danner of the April 3 incident are not consequential.

were Holly Farms employees. Hester answered yes. Another guard then came up and requested that the men move away from the entrance and further onto the parking lot. The men complied. When the men left their station near the plant door and moved close to the parking lot exit, the guard asked them not to put any handbills on the windshields of the employees' cars. Hester reassured the guards that he would not put handbills on the windshields and volunteered that he would not give handbills to employees going into the plant because they might throw them on the floor. Soon, four or five guards were on the scene. They asked the men to move out onto the street, off Company property. The three men

refused. Larry Church, in charge of safety and security at the Wilkesboro complex, then arrived, telling the men that they would have to leave. The men replied that they would not leave or move out onto the street; they had a right to handbill employees. After speaking on his portable phone, Church told the men to leave several times and warned them that if they did not move, they would be arrested. Wilkesboro Chief of Police Gary Parsons next came onto the scene, accompanied by a deputy, and gave the three men 15 minutes to leave. The men responded that they were not going to leave. After repeating his order several times, Parsons told the men that they were under arrest. Hayes and Branscome got

into the police car while Hester followed them to police headquarters in his own vehicle.

The three men were arrested under warrants issued pursuant to a Holly Farms' complaint, signed by Church, charging first degree trespassing. They never were locked up but sat in the lobby of police headquarters for about 2 hours, after which they were released in their own recognizance. Charges against the three men were dropped at an August 16 court appearance.

Hester testified without contradiction that on April 3, while they were seated in the lobby, Magistrate Mary Louise Canter, who later signed their releases, passed through. The magistrate told Hester that a re-

straining order had been signed limiting his activities on Company property. He could go to and from work at the transportation office, but nowhere else. Hester never actually saw this order. However, months later, on about August 1, he received further confirmation of the order's existence when he found it necessary to call safety and security supervisor Church for permission to speak to employees in the cafeteria at a time when, he had learned, Tyson representatives were going to be meeting there with employees. During that call, Church, answering Hester's inquiry, told him that there, in fact, was a restraining order against him and that Church personally did not have authority to grant Hester's re-

quest. When Hester, at Church's suggestion, called back soon thereafter, Church told him he could go to the cafeteria as long as he did not distribute union materials.

(iii) The written warnings

On about April 6, a few days after they were arrested and released, Hester, Branscome and Teddy Ray (T. R.) Hayes, during separate interviews with transportation vice-president David Hayes, were given written warnings dated April 3.

On April 6, T. R. Hayes was called into David Hayes' office to meet with David Hayes, head dispatcher Bob Absher and outhaul manager Barry Wood. David Hayes told T. R. Hayes that the written warning he was giving him was for the April 3 incident in the park-

ing lot. It was Holly Farms' policy not to allow solicitation at any time, or of any kind, on Company property and that, if T. R. Hayes did anything further, more severe disciplinary action wold be taken against him. T. R. Hayes then was given the written warning. Nothing more was said.

A written notice also was given to Hester. Branscome related that after learning of the warnings administered to T. R. Hayes and Hester, he called David Hayes who confirmed that such a written warning also was waiting for him, which Branscome later received.

The reason for the warnings as set forth in the notices given to T. R. Hayes and Branscome was "Failure to follow instructions of Holly Farms

Senior Management on 4-03-89. Further occurrences will result in more severe disciplinary action." In the warning given to Hester, the above first sentence was the same, but the second sentence was replaced by the following: "This is the third written warning involving this employee. Next disciplinary action will result in discharge."

David Hayes did not recall having said anything about solicitation during these warning interviews. When he spoke to T. R. Hayes on April 6, he told that driver that he had to give him a written warning for failure to follow the instructions of Holly Farms senior management on April 3, 1989. He asked T. R. Hayes to sign the document and then he,

too, signed. Absher recalled that Barry Foster, another driver, had attended on T. R. Hayes' behalf but that Foster had said nothing.

David Hayes testified that his discussions with Hester and Branscome, also attended by Wood and Absher, did not differ significantly from his talk with T. R. Hayes. Branscome merely had expressed displeasure that the Company had had him arrested. Hester, during his disciplinary interview, had declared that things had not been done properly; that he had a right to do what he had been doing. Hayes replied that he had not made that decision but since Hester had known that the parking lot was a secured area, he should not have done what he did. Hester again

protested that Hayes was wrong. The three men received copies of their warning notices.

(iv) Prior practices

Hester, Branscome, T. R. Hayes and other employees testified that before April 3, no restrictions had been placed on off-duty employees' access to the Company's parking lots. During the Unions' campaign to organize the drivers and yardmen, which led to the March 9, 10 and 11 election for that unit, Hester related that he had spent much time in and about the transportation department parking lot. T. R. Hayes reported that, before April 3, he used to go through the same parking lot to visit the office of the workers compensation representative; that he had parked in

and passed through Company parking lots while patronizing cafeterias in all the complex plants and while purchasing chickens at the Company's retail store—all without incident.

Most conspicuously, however, it is undisputed that during the 3 days of the drivers-yardmen election, on March 9, 10 and 11, employees active for the Unions had set up a hospitality stand in a parking lot near the dispatchers' office where, from the back of a pickup truck, they served coffee and doughnuts to employees who either were coming in to vote or were leaving the voting place. This truck, which operated from 9 a.m. to 9 p.m. during all 3 election days, was variously manned by Hester, Danner, Wyatt, Branscome,

T. R. Hayes and others who, in addition to the refreshments, also gave out caps displaying the Teamsters logo, license plates, authorization cards and union literature. While this hospitality stand was open, members of management and supervision, including Blake Lovette, David Hayes, John Sloop and Gerald Lankford had stopped by, spoken to and even briefly socialized with the employees operating the stand. Wyatt testified that on March 11, at about 10 a.m., while the polls were open, Blake Lovette pulled up to the stand where Wyatt was passing out coffee and doughnuts and told Wyatt that he would be better off learning to drive on ice rather than participating in union activities. Wyatt replied that he

felt that Lovette had done a good job for the Company in raising its profits and stock prices, but that Lovette just did not know anything about human relations. Lovette told Wyatt that he could see that the two of them never were going to agree, and drove off.

The record is clear that in spite of Holly Farms' knowledge that the hospitality truck was actively functioning in its parking lot near the transportation office during 3 voting March days, the Company did not interfere with its operations or suggest the stand be closed or moved. The General Counsel and Unions argue that it only was after the Company was surprised by the Unions' success in winning that election that, for

the first time, it restricted access to its parking lots by off-duty employees. The Company did that to make more difficult the Teamsters' continuing campaign to organize Holly Farms' live haul and production employees. These parties assert that some of the same employees who had been permitted access to the Company parking lot to operate the hospitality stand in early March, less than a month later, were threatened with arrest, actually arrested and were given written warnings for continued union handbilling in parking lots that suddenly had become off-limits.

Larry Church, in charge of safety and security at Holly Farms' Wilkesboro plant, basically confirmed the details of the April 3 arrests of

Hester, Branscome and T. R. Hayes, which occurred pursuant to warrants sworn by himself. Church contends that this was done in accordance with Rules 6 and 7 of Holly Farms General Post Orders, issued to the entire security department. These rules, in effect for many years, were revised by Church in April 1985, since which time they have remained unchanged. The relevant rules of the General Post Orders are as follows:

> 6. Must keep constant alert on employee parking lot for theft, loitering, etc.
>
> 7. The distribution of non-Company literature throughout the Company parking areas on windshields of vehicles or otherwise shall be strictly prohibited.

Church explained that the Company's east and west side parking

lots are secured areas, enclosed by fences, and that Hester, Branscome and Hayes were arrested when they refused Company requests that they leave the western lot.

Vice-president for human resources Lankford testified that it was he who had made the decisions concerning the arrests after being notified of the handbilling activities on the two parking lots. Lankford initially had directed security guards to tell the men to move to the entrances or to pass out their literature on the sidewalks, but not to remain on the parking lots. After receiving the guards' report that the three persons in the smaller lot south of the food service plant had left, he had sent Church to the other parking lot when

the three men there had refused to leave. Lankford also summoned the police and finally ordered the arrests when the handbillers had remained adamant.

(v) Policies concerning access and distribution

Lankford explained Holly Farms' policy concerning access to its property by the general public during the first half of 1989. Persons other than employees were permitted to come onto Company property, to park their vehicles in the parking lots and to have meals in the cafeterias. Members of the public also might visit someone's office for particular purposes, take guided tours of the Company's plant and purchase chickens at the store. Visitors could park in the lot and proceed to their destina-

tions, but they could not loiter in the parking lots or in any other secured areas. Employees not on duty enjoyed the same access to Company property, including its parking lots, as did outside visitors.

In 1988-1989, employees were not allowed to solicit for any purpose on Company property. According to Lankford, this rule had been put into effect 5 years before when, after the Company had permitted farmers to come onto Company parking lots and streets to sell apples and other produce, matters had become uncontrollable. The opened areas had become crowded with people trying to sell miscellaneous items and who had papered windshields with advertisements.

Accordingly, a decision was taken to prohibit all activities in the parking lots, including distribution of materials and the placement of anything on windshields, and to make the parking lots totally secure. This policy, since then, has been enforced with regard to both employees and outside visitors, all of whom were prohibited from soliciting, handing out literature or from doing anything in Company-owned Wilkesboro parking lots besides parking their cars and moving on. Lankford testified that the decision to secure never was published in written form or generally communicated, but that the Company merely had secured its parking lots by use of its security personnel who communicated these

rules to anyone who attempted to solicit or advertise in those places. As part of the security operation, Holly Farms had been erecting fences, which it continued to do, around the lots and had begun to use cameras transmitting video images of the lots to a centralized guard station. The use of the video camera began before the mid-February 1988 death of Holly Farms then-chief executive officer, Sam Zimmerman, who had authorized the same, and the number of security guards was increased, with roving guards being assigned to go through both the plants and the parking lots.

Blake Lovette and Everett (Skipper) Solomon[104] cited unsettled prop-

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[104] Solomon, Holly Farms division vice-president, North Carolina, after the July
(continued...)

erty title to distinguish the small parking area where pro-union employees had set up the hospitality stand during the March election from the other, more secured, completely fenced parking areas. Part of the site where the hospitality stand stood had been acquired several years before when Holly Farms, needing additional parking space at its Wilkesboro complex, had purchased a small plot for such purpose from the Duke Power Company. At about the same time, Holly Farms had taken a non-warranty deed on a smaller adjacent parcel of land, also to be used for parking. The stand and the parked

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[104](...continued)
1989 takeover, became Tyson's regional manager, North Carolina, with basically the same duties—which included management of the Wilkesboro complex.

vehicles of those who operated it were spread over both adjoining parcels. The non-warranty deed was prepared because, as the owner of the relevant plot was unknown, Holly Farms then could use the property openly and, years later, acquire title to it by adverse possession.[105] Accordingly, while no one had claimed the smaller plot, Holly Farms did not, itself, yet own the land and was concerned that someone still might claim the property.

Both the lot acquired from Duke Power and the disputed adjacent lot, gravelled over, were used for Holly Farms transportation drivers' parking

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[105] Under the North Carolina rule, a party might achieve title to disputed realty after 7 years of open, notorious occupancy and use.

and, also, for random, unassigned and overflow parking.

The Respondents' point, as described by Blake Lovette, is that since, at the time of the March election, the Company did not have clear ownership of the entire plot of land where the hospitality stand had been set up and, as the drivers' vehicles had been parked both in the area purchased from Duke Power, which the Company owned outright, and on the title-disputed plot, the Company had not asked the drivers running the stand to leave. This was because, as Lovette explained, he could not do so if the Company did not own the land outright. He noted that the drivers had not been bothering him. Lovette also conceded that the ownership is-

sue had not prevented Holly Farms from using that area as it had any of its other parking lots. The record also shows that, before and at the time of the March election, the area where the hospitality stand was located displayed the following sign, positioned so as to apply to both properties:

NOTICE
No trespassing
Solicitation or distribution
of materials allowed on
Company property at any time

Rabon E. Roten a Holly Farms day shift security sergeant who has continued in that capacity under Tyson and who was present when Hester, Branscome and T. R. Hayes were arrested, testified that, when those arrests occurred, he had not known that title to the property where the

drivers had had their March election hospitality stand was in dispute. He had learned of this only well after the start of the hearing in this proceeding, and almost a year after he had replaced the above existing faded signs on that property with like signs that were easier to read.

(vi) The parties' positions; discussions and conclusions

The General Counsel and Unions contend that the Respondents' actions in threatening to arrest the six above-named employees, and in causing the actual arrest of three, for handbilling on two Company parking lots were discriminatory and were for breach of an unlawfully broad no access/no solicitation rule that Holly Farms had begun to enforce only after the Unions were successful in the

March election for the drivers-yardmen unit. They assert that the rule was then maintained and enforced strictly and selectively to thwart the Unions' continued organizing campaign among the Company's live haul unit and production employees. These parties argue that Holly Farms' readiness to tolerate the drivers' hospitality stand in a Company parking area for 12 hours a day during all 3 days of the March 9-11 election was a conspicuous example of the Respondents' selective enforcement of that policy. The General Counsel and Union also assert that the Company thereafter further violated the Act by discriminatorily issuing written warnings to the three employees who had been arrested for union handbill-

ing, and by telling employee T. R. Hayes, when giving his written warning, that it was Holly Farms' policy not to allow solicitation at any time, or any kind, on Company property.

The Respondents, in turn, argue that the security rules restricting access to its parking lots by off-duty employees and others had been in effect for at least 5 years; had been promulgated for reasons described above unrelated to the Unions' campaign, which included theft prevention; had been distributed for years to the security force; and that the secured status of the lots, for the most part, long had been rendered conspicuous by fencing, by guard patrols and by posted signs. The Re-

spondents contend that the hospitality stand was permitted during the March election because, in part, it had been set up on land to which Holly Farms did not have clear title and because, as a practical/tactical matter, it did not appear logical to initiate a confrontation with employees while a representation election was in progress.

In Tri-County Medical Center, Inc.,[106] the Board stated the applicable rule that a no-access rule concerning off-duty employees is valid only if it:

> . . . (1) limits access solely with the respect to

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[106] 222 NLRB 1089. Also see 299 Lincoln Street, Inc., a wholly-owned subsidiary of Broad Reach Health Services, Inc., 292 NLRB 172, 187; NLRB v. Pizza Crust Company of Pennsylvania, Inc., ___ F.2d ___, 129 LRRM 3002, 3006 (C.A. 3, 1988), enfg. 286 NLRB 490.

> the interior of the plant and other working areas; (2) is clearly disseminated to all working employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates and other outside non-working areas will be found invalid.

Here, as in Tri-County Medical Center, supra, the record shows that Holly Farms did not inform its employees of the existence of the General Post Orders restricting their access to the parking lots while off-duty, except, perhaps, on ad hoc bases not described in the record. Rather, safety and security supervisor Church testified that Rules 6 and 7 of the Company's General Post Or-

ders, which governed the security guards' actions in this matter, were distributed only to members of the security department; were not published or given to non-security employees and were made known to employees or outside visitors only when the security department employees enforced those rules against them. Lankford also testified that the Company's 5 year old decision to secure the parking lots likewise was never announced to employees.

Holly Farms' application of its no-access rules against off-duty employees in the present case is also invalid because the rules, as stated in Item 7 of the General Post Orders and the erected parking lot signs, do not clearly limit access solely with

respect to interior, or other work areas or as to worktime. As noted by the U.S. Court of Appeals, Third Circuit, in NLRB v. Pizza Crust Company of Pennsylvania, Inc., supra, an employer may not prohibit its employees from distributing union literature in nonworking areas during nonworking time absent a showing that such a ban is necessary to maintain plant discipline or production.[107] There was no showing by the Company to either effect. The Respondents did not seek to establish that, on April 3, the six off-duty employees in the two parking lots interfered with vehicular traffic, employee ingress or egress, employees at work or that

[107] Eastex, Inc. v. NLRB, 487 U.S. 556, 570-571 (1978).

they created a disturbance. The Company merely was opposed to the employees' being where they were and doing what they did.

The record also shows that in spite of the restrictions on access set forth in Rule 7 of the General Post Orders and on the signs erected in the area, Holly Farms did not consistently enforce these restrictions, as indicated by its acceptance of the hospitality stand during the 3 day election. The Respondents' argument that it had not closed the stand because it did not have clear title to all the land where the stand and associated vehicles were located is unconvincing. Ever since acquisition, the Respondents had been using the two relevant adjacent plots as a sin-

gle parking lot with no material distinction from the Respondents' other Wilkesboro complex parking lots, except as to fencing, which was a continuing project on the Respondents' property. Holly Farms had positioned the erected sign posting restrictions so as to be applicable to both plots; had gravelled both parcels uniformly; and had not made known the existence of any question concerning property rights either to its employees or to its security personnel who were charged with enforcement.

Accordingly, I find that Holly Farms violated Section 8(a)(1) of the Act by repeatedly and disparately enforcing its no access/no solicitation rule to discourage employee

union activity;[108] by promulgating and enforcing an unlawfully broad no access/no solicitation rule affecting its premises;[109] and by threatening employees Wyatt, Lackey, Danner, Hester, Branscome and Hayes with arrest if they did not quit union handbilling on the Employer's premises in breach of its unlawful no access/no solicitation rule.[110] The Respondents violated Section 8(a)(3) and (1) of the Act by causing the arrests of Hester, Branscome and Hayes because, in the applicable circumstan-

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[108] 299 Lincoln Street, Inc., et al., supra (JD 22); Tri-County Medical Center, supra.

[109] 299 Lincoln Street, Inc., et al., supra.

[110] Roadway Package System, Inc., 302 NLRB No. 159, sl. op. 3; The All American Gourmet, 292 NLRB 1111, fn. 2; Medical Center Hospitals, 244 NLRB 742, enfd. 626 F.2d 862 (C.A. 4, 1980).

ces, they would not stop their handbilling;[111] and by David Hayes' issuance of written warnings to the three previously arrested employees in retaliation for their continued union activities and in enforcement of the Respondents' unlawful no access/no distribution rule.[112] I finally find that the Respondents also violated Section 8(a)(1) and (3) by David Hayes' April 6 statement to T. R. Hayes, when giving him the written warning, that it was Holly Farms' policy not to allow any solicitation at any time or of any kind, on Company property and that, if T. R. Hayes did anything further, more severe disciplinary action would be taken against him.[113] In so concluding, I accept T. R. Hayes' account of what was said to him at the time because consistent with the Respondents' actions in this regard.[114]

[111] Medical Center Hospitals, supra.

[112] Funk Manufacturing Company, 301 NLRB No. 15, sl. op. 4.

2. The alleged Section 8(a)(1) violations affecting live haul unit and other employees—facts and conclusions

Holly Farms' live production division within the Wilkesboro complex and in outlying facilities encompassed hatcheries, feed mills, feed hauling, the growing of broilers and the live haul department, which was

[113] Ibid.

[114] The U.S. Supreme Court's recent decision in Lechmere, Inc. v. NLRB, ___ U.S. ___, 139 LRRM 2225 (1992), which limits the access rights of non-employee union organizers to an Employer's premises for organizing activities, of course, is inapplicable here as that case did not restrict access for such purposes by the Employers' employees.

responsible for catching and transporting chickens to the Wilkesboro processing plants. While the Board, in its decision and direction of election in Case 11-RC-5583 found certain live operations, such as the hatcheries, to be exempt under the Act because agricultural, the Board did order an election among employees in Holly Farms' live haul department, part of that Company's live production division, which included chicken catchers and live haul drivers. The chicken catchers, after punching in at the live haul timeclock in the Wilkesboro complex, were driven to the growing areas where the broilers were raised. There, they caught and caged the chickens for transportation to the processing plant on flat-bed

trucks by the live haul drivers. These drivers operated the vehicles used to move the chicken catchers and poultry between the growing farms areas and the plant. Also included as part of the "live haul" unit were feed mill, feed hauling and service center employees at Roaring River, North Carolina.

As noted, while the drivers-yardmen unit of the transportation department was jointly represented by the seven local unions, only one of those locals, Local 391, herein the Union, had petitioned—on February 16—for an election among the above live haul unit employees. Local 391 was unsuccessful at the July 27 election. While the Teamsters also concurrently conducted an organizational

campaign among production workers, no election petition was filed as to them. What follows is consideration of Respondents' conduct during Local 391's campaign alleged to have interfered with the rights of live haul unit and other employees under Section 7 of the Act.

(a) By Charles Robert (Bob) Sebastian

The General Counsel contends that Sebastian, then-manager of the Holly Farms Wilkes hatcheries, engaged in surveillance of union meetings during 2 days. The Respondents deny both Sebastian's unlawful conduct and his supervisory status.

Hatchery division employee Terry Osborne[115] testified that on July 15,

[115] Osborne, who has continued in the employ of Tyson/Holly Farms in the North (continued...)

at approximately 2 p.m., as he pulled his vehicle into the Days Inn Motel parking lot in Wilkesboro to attend a meeting called by Local 391, to be conducted there by Local 391 organizer R. W. Brown, he saw Bob Sebastian, manager of the Holly Farms Wilkes hatcheries, move his van from a remote parking space on the Days Inn lot to a space closer to the front of the motel, passing Osborne in the process. Osborne then entered the motel to attend the session in one of the meeting rooms. About 25-30 em-

[115](...continued)
Wilkesboro breeder division, reported that Local 391 had scheduled three July 15 meetings for the Days Inn facility. The hatchery division employees' meeting was set for 2 p.m.; the processing employees were to meet at 4 p.m.; and the transportation employees were scheduled for 6 p.m. As a hatchery employee, Osborne would have been excluded from the live haul unit found appropriate by the Board in Case 11-RC-5583.

ployees also were present. When Osborne briefly looked outside the motel about a half-hour later, he saw Sebastian, shirtless and wearing Bermuda shorts, seated at a pool-side table facing the hall entrance to the pool area at about 50-60 feet from the Union's meeting room. Within a couple of minutes, Osborne returned to the meeting. When Osborne finally left the premises, he saw no Company supervisors in the area.

Live haul driver James Phillip Church also testified that in mid-July, while he, too, was at the Days Inn to attend a union meeting, he saw Sebastian, dressed casually, pass through the motel's outside hallway between the meeting rooms. Church related that, when he spotted Sebas-

tian, he had just come out of the conference room where his union meeting was held.[116]

Osborne related that on July 22, at about 3 p.m., he attended another union meeting at the same Days Inn.[117] When Osborne heard someone say that Sebastian was out there again, he stepped into the hall and saw Sebastian by the pool, attired in a shirt and jogging pants. Sebastian was about 20-30 feet from Osborne and was looking away from the motel. Osborne did not say anything to Sebastian.

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[116] Church related that although he and Sebastian worked in different areas and he had not seen Sebastian exercise supervisory authority, he knew who Sebastian was, having met him occasionally over a 10 year period.

[117] On July 22 the Union again had scheduled meetings with the same groups of employees and in the same sequence as on July 15.

Sebastian[118] testified that during the summer of 1989, he had continued

[118] Sebastian related that 5 supervisors and 15 hourly-rated hatcheries employees, including 8 chick haulers and 7 egg haulers, reported directly to him as manager of the Respondents' Wilkes hatcheries. About 95 hourly-paid employees also reported to him indirectly through the 5 supervisors. The parties stipulated at the hearing that Sebastian exercised sufficient authority over the hatcheries employees to functionally qualify him as a supervisor and an agent of the Respondents within the meaning of Section 2(11) and (13), respectively, of the Act. However, the Respondents contend that since Sebastian supervised only excluded agricultural hatcheries employees, he was not a supervisor and agent under the Act. While the General Counsel agree with the above-described level of Sebastian's authority and with the functions attributed to him, the General Counsel assert that Sebastian supervised both exempt agricultural employees and non-exempt persons who qualify as employees within the meaning of Section 2(3) of the Act. However, the General Counsel did not identify employees supervised by Sebastian who were non-agricultural and, therefor [sic], non-exempt. As the Respondents argue, Sebastian may not be a supervisor within the meaning of Section 2(11) of the Act because he exercised authority only over individuals who were exempt under Section 2(3) of the Act. Nonetheless, as a member of the Respondents' management with what otherwise would be conceded supervisory-level responsibility for overseeing a Respondents' operation employing some 115 individuals, he, at least, must be considered, and I find that he was, a Respondents' agent within the meaning of Section 2(13) of the Act.

his practice of the preceding 10-15 years of going to the Days Inn pool to relax in the sun practically every summer weekend from his home about 4-5 miles away. In 1989, as before, even while the motel had been owned by Days Inn's predecessor, Holiday Inns, he followed this custom. He had started going to those premises for entertainment when it was a Holiday Inn because on Friday and Saturday nights there was a dance band. In that earlier period, he had become friends with the Holiday Inn manager and assistant manager, who had given Sebastian and his friends access to the motel pool. However, since Days Inn took control of the motel, about 2 years before, Sebastian no longer had a relationship with the motel's

management and there was no band. Nonetheless, although he kept a boat on a lake approximately 8 miles from his home, Sebastian continued to go to the Days Inn pool more than six times a month during the summers. He had been doing this for a long time, enjoyed it and had not been prevented from continuing by Days Inn management.

Sebastian averred that during the summer of 1989, while at the Days Inn, he did not see any Holly Farms' employees; that he did not know Phillip Church; that he had seen no live haul personnel;[119] that no one from Holly Farms had asked him to go to

[119] The Respondent's live haul operation in Wilkesboro was approximately 3 miles from the hatcheries. Sebastian had last worked in live haul, as a supervisor, about 20 years before.

Days Inn and report what he saw there; and that he did not write the names of anyone at that motel. While, as he later learned, a union meeting may have been in progress while he was at the motel, he denied having known of any such meeting at the time.

I credit Sebastian's denials that he was at the Days Inn pool on the dates in question to conduct surveillance of the union meetings that were in progress while he was there. The Days Inn is a public place and its pool could well have had an inviting appeal on hot summer days. Sebastian's testimony that his long-time use of that pool, both under Holiday Inn and Days Inn managements, is uncontradicted and, contrary to the

General Counsel, there is no convincing evidence in the record that Sebastian, apart from his mere presence, engaged in conduct inconsistent with his claim of pool-side relaxation. Although meetings of hatcheries workers also were conducted while Sebastian was at the motel and he might be expected to recognize them, since the Board previously had excluded hatcheries workers from the Act as exempt, I cannot in any event find that surveillance of their union activities, as described by Osborne, was prohibited under the Act. However, even if I were to find that Sebastian had been spying on the hatcheries workers' union activities, which I do not, it would be difficult to extrapolate to a further determi-

nation that he also must have been there to spy on the scheduled meetings of the live haul and transportation employees since the record contains no foundation evidence that he would have recognized them.[120] The Wilkes hatcheries, managed by Sebastian, were approximately 3 miles from the live haul operation, and Sebastian had not worked in live haul for 20 years. There is no showing that he had had any contact with the transportation employees so as to be meaningfully able to report on their union activities and Sebastian's option of using his boat does not translate into a legal obligation to spend his summers in it. According-

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[120] In addition, Osborne testified that by the time the July 15 meeting he had attended was ended, Sebastian was not in sight.

ly, I find that Sebastian, as the Respondents' agent, did not violate Section 8(a)(1) of the Act by conducting surveillance of the Respondents' employees during 2 days in July.

(b) By Ray Lovette

Live haul drivers Dennis G. Dimmette, Burl Parsons, Joseph Phillips and James Phillip Church testified concerning their respective interviews with live haul department manager Ray Lovette,[121] in late February

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[121] Lovette's duties as live haul manager, Wilkesboro, included supervising the movement of poultry from the grow-out farms under contract to the Respondents to the processing plant in the Wilkesboro complex, and entailed general supervision of the chicken catching crews, consisting, as noted, of chicken catchers and live haul drivers. Lovette, with the assistance of two superintendents and 12 supervisors, oversaw the work of approximately 165 employees.

Live haul drivers in the live production department were distinct from the long distance and local drivers within the trans-

(continued...)

and early March,[122] when Lovette arranged to meet individually with each driver in supervisor Tommy Eller's office. Eller did not attend these interviews.

Parsons testified that, on February 16, Ray Lovette called him into Eller's office and asked how Parsons felt about the Union. Parsons replied that the men needed something to help them; they could not make it on a 4 day workweek. Lovette asked

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[121](...continued)
portation division. Live haul drivers, unlike the transportation drivers, did not make deliveries to customers, but merely transported the chicken catchers to the grow-out farms and, operating flat-bed trucks, moved the caged chickens to the processing plants. On occasions during the summers, live haul drivers not otherwise occupied, might be assigned to water tank trucks to spray-cook chicken houses and chickens.

[122] Although Church testified that his talk with Lovette took place in May, I conclude from the weight of the evidence that it had occurred during the first week of April.

how the Union could help the men. It couldn't get them more time. Parsons answered that it might get them a wage increase. Parsons related that, until then, he had not worn union insignia or otherwise revealed his union sympathies.

Dennis G. Dimmette related that his interview with Ray Lovette occurred in early March. Lovette asked how Dimmette felt about the Union; if it had helped him. When Dimmette answered that the Union already had helped him, Lovette wanted to know how. Dimmette replied that it already had helped him because Lovette, for the first time, was showing enough interest to ask questions about his problems at work. In response to Lovette's inquiry as to

what Dimmette's problems were, Dimmette told him that his biggest problem was that he only was working 4 days a week and that it was hard to live on the money he was taking home. Lovette reassured Dimmette that he knew this was a problem, and that he was going to try to get the employees more time. Lovette told Dimmette that Holly Farms did not want a union.

Dimmette related that from 2 weeks to a month after this conversation with Ray Lovette, the live haul employees began to receive 5 workdays per week.

Joseph Phillips testified that, on about March 1, after Ray Lovette had gathered together a group of live haul drivers who had just completed

their shifts, including himself, and had taken each driver, separately, into supervisor Eller's office. When Phillips was reached, Lovette asked how Phillips felt about the union. Phillips replied that he felt very strongly. Lovette asked why. What did Phillips feel that the Union could do for him? Phillips told Lovette that he did not know. The Union had offered to help; Holly Farms had not. Lovette then told Phillips that the Union would not be at Holly Farms and that anyone caught distributing literature on the Company's property would be dismissed. Then, because Phillips was displeased about insurance coverage, the two men spoke for about 20 minutes more about the insurance plan.

James Phillip Church averred that Ray Lovette, in an upstairs area in the live haul building, told him that he knew that Church worked for Local 391. When Church asked how Lovette knew this, he was told that Lovette had a letter on his desk stating that Church worked for the Union.[123] Lovette did not answer Church's request to see the letter, but asked what was the problem. Church, too, told Lovette that the employees did not get enough worktime (with only 4 workdays a week) and did not make enough money. Lovette stated that he was going to try to get the employees 5

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[123] Church testified that his organizing efforts for the Union among the live haul employees had been quite open. He had handbilled, mostly in the parking lot, and had given out authorization cards. To his knowledge, however, no supervisor had been around when he was handbilling.

workdays a week and more money. By the end of May or the start of June, the live haul employees began to work 5 days workweeks.

Ray Lovette agreed that, during the first week of April, he did meet with all 36 Holly Farms live haul drivers, including Dimmette, Parsons, Phillips and Church, in a series of one-on-one interviews in Eller's office. These had resulted from a roundtable conversation chaired by Holly Farms' vice-president for North Carolina operations, Everett (Skipper) Solomon, and joined by Lovette; by the Holly Farms' vice-president for human resources Lankford; and by Lovette's immediate supervisor, Samuel S. Whittington, live production manager, Wilkesboro. Those present

agreed with Solomon that since the employees had felt that they needed a union, it was necessary to talk to them to find out what the Company had been doing wrong. Accordingly, it was decided to meet with the employees for that purpose and to try to correct any problems uncovered. The conference between Lovette, Solomon and the other supervisors where it had been decided to conduct these interviews had taken place during a hiatus period, shortly after March 27, when the February 16 petition in Case 11-RC-5583 had been dismissed, but before April 28, when it was reinstated. Lovette's interviews with the drivers were held during that same interval. Accordingly, the Respondents argue, that when Lovette

met individually with the live haul drivers during the first week in April, Company officials had reason to believe that the dismissed representation case involving live haul employees was permanently behind them and that they, again, could deal with their employees.

Lovette explained that in his meetings with the drivers, he merely followed instructions from Solomon, Lankford and Whittington.

During these sessions, Lovette told each of the interviewees that the Company wanted to meet with all the drivers to learn why they thought they needed a union; Holly Farms wanted to correct anything it had been doing wrong. Lovette then asked

each what the Company had been doing wrong.

Lovette recalled that his lengthiest conversation in the series was with Phillips, who long had been with him and was his friend. Phillips complained that neither he nor the other live haul drivers were getting enough worktime to make a living and that, because of low earnings, Phillips had been unable to obtain a loan for a desired house. This shortness of worktime and money also was echoed by others as their principal concern. Lovette explained that live haul drivers had been working the brief 4 day workweeks because of a shortage of live chickens. Lovette committed to the drivers that he would try to get them more time and money by re-

ducing the size of each work crew through attrition. Accordingly, he would not replace department crew members until each of the 36 twelve-member chicken catching crews was down-sized by 1 employee.

Lovette testified that he had told the same things to Parsons as to the other live haul drivers during their interview, but that he could not recall what Parsons had said in return. Lovette denied ever having spoken to Phillips or to any other employee about handbilling. However, Lovette insisted that he did keep his promise to get the drivers more work through attrition and did not replace those who left the Company's employ until about 12 jobs were eliminated. This process, which took until May, then

enabled him, during most weeks, to increase the number of weekly work-days from 4 to 5 for the remaining employees. However, the 5 day work-week never became definite because employees were kept off the job when the slaughter rate was reduced. Nonetheless, as the Company's business had been good during the second half of that year, work hours continued to increase after May.

Except for denying that he had spoken to Phillips or to the other employees about handbilling, Ray Lovette did not dispute the four drivers' descriptions of their interviews with him. While agreeing that he had promised to remedy employee complaints about the inadequate pay resulting from the short 4 day work-

weeks, Lovette did not go into the details of his meetings with the employees. Lovette testified that he had chosen to talk to the drivers rather than the other live haul employees because he believed that they were more interested in the Union and that the Union was more interested in them. I, therefor, credit the essentially uncontradicted accounts of the four drivers as to what Lovette told them during these meetings, including Phillips' testimony, denied by Lovette, that Lovette had informed him that anyone caught distributing literature on Company property would be dismissed. Lovette did not deny having engaged in a variety of other unlawful conduct during these interviews and, as found above, during the

same week when, according to Lovette's testimony, he spoke to the live haul drivers, the Respondents had threatened the arrest of six employees for union handbilling on Company property; had caused the arrest of three of those employees for persisting in such conduct; and had given the three arrested employees written warnings, threatening one with discharge. At the same time, Lankford, in a speech to live haul employees, had mentioned the three arrests while prohibiting union handbilling. Against this background, in crediting Phillips, it appears that Lovette, in telling Phillips that anyone caught union handbilling would be discharged, was merely expressing Company policy.

I also accept the General Counsel's contention that Dimmette, Phillips and Parsons were unlawfully interrogated concerning their union sympathies by Lovette during the above-described meetings.[124] While Dimmette was the most active union supporter of the three in that he posted union literature on bulletin boards, the record does not show that this, or any of his other union activities, had been known to management. Parsons and Phillips, too, had been overt union supporters when they were asked how they felt about the Union. While, as described by Lovette, he and Phillips might have had a cordial, or even a friendly rela-

[124] Rossmore House, 269 NLRB 1166, enfd. 706 F.2d 1006 (C.A. 9, 1985); Sunnyvale Medical Clinic, 277 NLRB 1217, 1218.

tionship, this was not reflected in their interview where Phillips as found above, was warned, in effect, that he and others could be discharged if caught distributing union literature on Company premises.[125] Noting, too, that these interviews were privately conducted in a recognized place of authority, a supervisor's office, I conclude that the Respondents serially violated Section 8(a)(1) of the Act by Lovette's admitted consecutive interrogations during 36 interviews with live haul drivers as to how these employees fell about the Union. While Church, too, was similarly interrogated by

[125] See Harrison Steel Castings Company, 293 NLRB, supra, at 1168; Colorado-Ute Electric Association, Inc., 295 NLRB No. 67, supra, at JD 30.

Lovette in like setting, I find that such conduct was not unlawful since Church previously had been named by the Union in correspondence to the Employer as a member of its in-plant organizing committee. Church also openly had engaged in union activities and his pro-union stance was generally known.

Having credited the employees' accounts of their interviews by Lovette,[126] I find that the Respondents violated Section 8(a)(1) of the Act, respectively, by Lovette's solicitations of and promises to remedy the grievances of Dimmette, Church and other employees, and by actually rem-

[126] Since Lovette was the witness most certain as to when these interviews occurred, I accept his testimony that they took place during the first week of April.

edying these grievances.[127] In agreement with the General Counsel, I further find that the Respondents also violated Section 8(a)(1) of the Act by Lovette's statements to Phillips that a union would not be at Holly Farms, which expressed the futility of supporting the Union; and by Lovette's threat to Phillips to discharge anyone caught union handbilling on Company Premises. Contrary to the General Counsel, I find no evidence that Lovette had said anything to Parsons to the effect that it would be futile for him to support a union.

I am not persuaded by the Respondents' argument that, since the ar-

[127] S. E. Nichols, Inc., 284 NLRB 556, 574-575.

rests of the employees for union handbilling, the threatened arrests, the written warnings, Ray Lovette's interviews with the live haul drivers and other disputed conduct, all had occurred during the period when the representation election petition in Case 11-RC-5583 had been dismissed and not yet reinstated, their conduct during that interval should not be considered in assessing violations of the Act or in support of objections to the later election in that case. This is argued on the ground that since under Goodyear Tire and Rubber Company, supra, as described above, the critical period before an election commenced with the filing of the petition, the absence of an effective petition between that petition's dis-

missal and reinstatement had interrupted that critical period and lulled the Respondents into a good faith belief that the representation question had ended and that they could resume business as usual.

These arguments are unconvincing because Respondents, in any event, should have been restrained. The lawfulness of the Respondents' activities under the Act is not dependent upon whether an election petition has been filed, or remains current, but upon whether the conduct alleged as unlawful in any way coerced, restrained or interfered with employees in the exercise of their rights under Section 7 of the Act. As to whether such disputed conduct, occurring while the petition was in

limbo and subject to restoration, could be considered in support of election objections, that situation is somewhat analogous to that which obtains when an Employer, having won a representation election, acts unlawfully during the period when timely objections to the election still could be filed. In either case, there is an indeterminate procedural hiatus subject to change either, as here, by a motion for reconsideration, or in the analogy, by the filing of objections. In either situation, the Employer acts at its peril. An Employer's unlawful conduct occurring between the time it was successful in the election and when objections were filed has been found to have both violated the Act and to

have served as grounds for setting aside an election.[12]

In the present matter, the Respondents' activities during the interval between dismissal and reinstatement of the election petition merely continued their strong, often unlawfully-conducted, campaign to defeat the Union's organizational drive at their Wilkesboro complex. Such efforts started before the dismissal of that petition and were carried forward after that petition was reinstated. Even the longer workweek Lovette, in April, promised to get the drivers was not delivered until May, after the petition was reinstated. Accordingly, here, too, the Respondents

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[12] See Premier Maintenance, Inc., 282 NLRB 10-11, fn. 4, 16.

acted at their peril and I conclude that unlawful activities found to have occurred during the above hiatus period should be considered in determining whether the Act has been violated and whether the election in Case 11-RC-5583 should be set aside.

(c) By A. Gerald Lankford; Barbara Mathis

Live haul driver Dimmette testified that in late April, at around the 8 a.m. conclusion of their shift, he and a group of about 40 night shift live haul employees were summoned by their supervisors to attend a meeting in the cafeteria annex at Wilkesboro, conducted by then-Holly Farms vice-president for human resources, A. Gerald Lankford. According to Dimmette, Lankford told the employees that if the Union came in

at Holly Farms, and if there was a strike, the Company could haul its chickens to other plants for processing or it could close down the Wilkesboro operation and hire other workers in their place.

Production employee Paula Dowd[129] testified that, in late March, she attended a meeting of about 80 to 100 employees conducted by Lankford in the cafeteria annex of the Wilkesboro fresh poultry plant. Dowd related that she had not paid too much attention to what was said until Lankford, late in the meeting, told the group that the Company would relocate the plant to Virginia or Texas if it did not meet the Union's demands. While

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[129] See Premier Maintenance, Inc., 282 NLRB 10-11, fn. 4, 16.

Lankford principally read his statement to the employees from a prepared text, Dowd does not recall with certainty whether he read the above declaration or delivered it extemporaneously.[130]

Live haul driver James Phillip Church related that in late June, he and 15 to 20 other live haul depart-

[130] Dowd also testified without contradiction that, on April 3, she was approached by a Respondents' security guard while walking to her car after leaving work, while holding some union authorization cards in her hand for distribution. The guard told Dowd that she need not have those (cards) on Company premises. She said okay. The guard told Dowd that if she did not believe him, some of the truckers had been arrested earlier. Dowd repeated okay and left. Noting that the guard's admonition to Dowd was consistent with the Respondents' policy, manifested that same day, of using the security guards to threaten and to assist in the arrests of employees for distributing union literature in Company parking lots during non-work time, I find that when the guard spoke to Dowd, he was acting as a Respondents' agent. Hudson Oxygen Therapy Sales Company, 264 NLRB 61, 70-71. I further find that the Respondents violated Section 8(a)(1) of the Act by the guard's implied threat that Dowd, too, might be arrested if she gave out the cards on the Respondents' property.

ment employees—chicken catchers and live haul drivers—were at a meeting presided over by Lankford and attended by Barbara Mathis, personnel manager of Holly Farms' Wilkesboro complex. Church testified that Lankford opened the session by asking if the employees had any questions about the coming Tyson buy-out of Holly Farms. One employee asked about Tyson's insurance coverage. During the meeting, Lankford asked if there were any rumors about the Union. Church testified that when no one responded, Mathis interjected that, "If the Union wins the election, we'll know who you are and who voted because we'll see the cards. But if the Company wins, we'll hear no more about it," ending the meeting. However,

earlier during that session, Lankford also had told the employees, "No more handbilling. The Company had had three previous arrests and did not need any more."

Lankford testified that from late March to July, he met with various groups of Company employees during which he read a series of prepared speeches directed at the Union's campaign. The speech, dated April 12, heard by Dimmette and other live haul workers, contained the following language relevant to Lankford's explanation to the employees why the Union could not force the Company to do anything by calling a strike:

> There are good reasons why this is so. For example, we don't think it would ever come to that, but we have the numbers to show that we could close

> down every operation we have in Wilkes County, North Carolina, and continue to meet all our customer obligations. I'm not suggesting that we would voluntarily close down any operation in Wilkes County or any where else, but if these operations could be closed by a strike, we could sit that out indefinitely if we had to.

Lankford related that Dowd and others had heard him read an address dated March 29, delivered to groups of the Company's food service and roast chicken plant employees during a series of meetings in the cafeteria annex of the Wilkesboro fresh poultry plant. These groups which ranged in size from 75 to 200 employees, did not include live haul unit employees. In this speech, belittling the impact of any possible strike in the event of unionization, Lankford read the

following germane to what Dowd recalled as having heard.

> A determination also has been made that all of the poultry killed and processed in the Wilkesboro plant can easily be killed and processed in our other plants in Virginia, North Carolina and Texas. We would not lose <u>any</u> production to speak of even if we could not operate the Wilkesboro plant.
>
> As far as this plant right here is concerned, our Texas quick-to-fix plant is ready and able on a moment's notice to take over this production responsibility.
>
> I am simply telling it like it is.

In describing what might happen in the event of a Union-called work stoppage, Lankford then indicated that the Company would move its production processes from Wilkesboro to its other facilities in Virginia and

Texas. No questions were asked by employees during any of the meetings where this address was given. Lankford also denied having added anything beyond what was written and described above.

Lankford also gave a different prepared address to live production employees and to employees at the feed mill, bulk feed, and to non-live production employees at the Roaring River Service Center on June 29 and 30—which was heard by Church and others. While the text of this address describes an employer's right to replace economic strikers, should such a stoppage occur, the written text of the speech does not refer to handbilling or to the arrest of employees for doing so on Company prop-

erty and Lankford denied that arrests for handbilling or related consequences were mentioned during any question or answer session. Lankford also recalled that Mathis had attended most of the June meetings, when that last speech was given and that he was certain that Mathis had not stated that the Company would know how the employees had voted.

I accept Lankford's testimony that personnel manager Mathis did not make her above statement that the Company would know the way employees had voted if the Union should be selected at one of his meetings since live haul manager Ray Lovette testified that she made such a statement, not at a session conducted by Lankford, but during a talk to employees given

by Skipper Solomon. In this regard, Ray Lovette testified that he and Mathis were present at a June meeting of employees conducted by Everett (Skipper) Solomon, then-vice-president for Holly Farms' North Carolina operations. According to Lovette, Mathis had attended all such meetings held by Solomon, but had said nothing except to answer questions directed to her. However, at a June meeting, before the representation election, an employee asked if anyone would know how the employees had voted. Solomon replied that no one would know, but Mathis interjected that the Company would know, when the Union sent in their requests for dues checkoffs. Mathis complied with Lovette's signal to hush. Since Lov-

ette's testimony concerning Mathis substantially corroborated that of Church, and, noting that Mathis did not attempt to deny this incident although called to the stand by the Respondents more than once. I find that that the Respondents violated Section 8(a)(1) of the Act by Mathis' above statement which threatened employees with unspecified reprisals if they supported the Union and which threatened employees that their vote, if for the Union, would be known to the Respondents' management.[131]

While Ray Lovette also corroborated Lankford's testimony that he had not deviated from the written text of his speech and, therefor, did

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[131] S. E. Nichols, Inc., 284 NLRB 556, 577.

not tell the employees, in effect, that there would be no more handbilling, that three employees had been arrested for union handbilling on Company property and that the Company did not need any more arrests, I, nonetheless, credit Church's testimony that Lankford did make the statement to the above effect. Lankford, by his own testimony, that same week had been the principal force behind those arrests and the threatened arrests. Having taken that much trouble, it would have been quite consistent for Lankford to have tried to maximize the effects of those efforts by making additional employees aware of hazards of engaging in that type of union activity on Company property.

I, therefor, find that the Respondents violated Section 8(a)(1) of the Act by Lankford's above statement to employees which, impliedly, threatened employees with arrest if they engaged in union handbilling on Company property in breach of the Respondent's unlawfully broad no access/no distribution rule.

As to the prepared text of Lankford's March 29 speech described above, his remarks, in a different, less coercive atmosphere, might not have been violative of the Act since it is not necessarily unlawful for an Employer's representative, during a union campaign, to tell employees that, if the Union is selected and calls a strike to support its bargaining demands, the Employer could

continue to operate by relocating the struck operations to its other facilities, or by replacing its striking employees.[132] Since Lankford, in his talks, did not tell employees that relocation from Wilkesboro would be voluntary or inevitable but merely had announced, in effect, that, should a strike occur, relocation was a possibility and that the Company could sit out a strike indefinitely, I conclude that Lankford's references to a strike and its consequences, in other circumstances, could be construed as predictions of the possible occurrence of events outside the Company's control and not threats of of

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[132] Baton Rouge General Hospital, 283 NLRB 192, 210; The Salvation Army Williams Memorial Residence, 293 NLRB, supra, at 955, 963.

reprisal based on the Employer's own volition. However, Lankford's words, in the present case, when viewed against the background of the Respondents' other unlawful conduct found herein, including Lankford's own activities, had a tendency to coerce employees. I, therefor, find that the Respondents violated Section 8 (a)(1) of the Act by his March 29 speech threatening employees with relocation of their work and attendant loss of their jobs if they selected the Union.[133]

[133] Harrison Steel Castings Company, 293 NLRB, supra, at 1159. As the disclaimer of intent to voluntarily relocate, contained in his April 12 speech, made that address less menacing and not the threat of relocation less patent, I find that Lankford did not violate the Act by that address.

(d) By Samuel S. Whittington

Live haul driver James Phillip Church testified that on about April 28, he was summoned to meet with live production manager Samuel S. Whittington and live haul manager Ray Lovette. Whittington accused Church of harassing a couple of employees. Church denied having done so and asked for the names of the complaining employees, which Whittington declined to provide. Church, maintaining his innocence, also refused to comply with Lovette's request that he sign a personnel change of status (warning) form containing the following reason for the discipline:

> It has been brought to my attention by other employees that you have been harassing them here at work.

> This is to inform you and warn you that we will not allow you to harass other employees on any subject. If it happens again you will be terminated.

Although Church persisted in his refusal to sign the above warning, it finally was signed by Whittington as department head and by Lovette as a supervisor. Church testified that Whittington told him during that interview, after he had refused to sign the warning, that the Company would forget about it that time, but that if such conduct ever came to Whittington's attention again, Church would be terminated.

Church further testified that, during that meeting, Church told Whittington that he had been handbilling employees. Whittington re-

plied that Church could be fired for union activities.

Ray Lovette testified that the employees assertedly harassed by Church were two other live haul drivers, Eddie Dean Brown and Johnny Huffman, whom Lovette described as anti-union. While Lovette, on April 27, was in the superintendent's office while others also were present, Eddie Brown had come in and announced that he had been harassed. Lovette testified that he waited until Brown was alone and asked what had happened. Brown reported that "they" had threatened to beat the hell out of him, identifying "they" as Church and three others.[134] Brown told Lovette that

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[134] Brown, Huffman and Church all reported to Lovette through their supervisors.

(continued...)

these individuals had threatened him at the plant and had called him at home, telling him that he should quit "bringing [the Company] any information." If he continued, they were going to beat the hell out of him. Brown also related to Lovette that Church had threatened him in the break area about 2 days before.

At around the same time, Johnny Huffman, who had been away from work for 3 days, sent word to Lovette by Huffman's son, also employed at Holly Farms, that "they" had told him not to come to work. Huffman identified Phillip Church as one of these offenders. When Huffman returned to

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[134](...continued)
According to Lovette, although he asked them to do so, Brown and Huffman would name only Church, but not the others described as having menaced them.

work after his absence, he sent a message to Lovette, again through his son, that Lovette should not speak to him.

Accordingly, Lovette stayed away from Huffman for 1 to 2 days after his return and then spoke to Huffman in private. Huffman volunteered to Lovette that he was opposed to the Union and had been suggesting to employees in the break area that they withdraw their support for the Union. He told Lovette that Church and the others had threatened him and had threatened to harm his wife, also employed by Holly Farms. He was afraid for himself and to have his wife drive to work. This had caused Huffman to change his schedule by having Eddie Brown drive his car home while

Huffman waited at the plant until his wife's shift ended. They then drove home in her car.

There is a conflict between Lovette's testimony and that of Whittington as to what Lovette told Whittington when, on April 27, Lovette relayed these asserted complaints to Whittington as his immediate supervisor. Lovette testified that he had passed on to Whittington Huffman's account that Church and three others had threatened to beat the hell out of him and that he was afraid to come to work and to talk to Lovette. Lovette informed Whittington that Eddie Brown also had told him that Church and three others had threatened to beat him up and that he, too, was afraid. Both men had been threatened

at work and over the telephone. Except for identifying Church, neither Huffman nor Brown would say who the others were who had threatened them.

Whittington, however, described Lovette's April 27 report to him in less dramatic terms. Whittington testified that when Lovette had come to his office, he merely stated that two live haul employees, Eddie and Johnny, had come to him on separate occasions to complain that Phillip Church had been harassing them for not supporting the Union and had told them that it would be in their interest to switch sides and to stop supporting the Company. These men did not feel that they should have to contend with this. Whittington asked if these employees would be willing

to relate again what had taken place. When Lovette said that they would, Whittington told Lovette to have Church come to his office. Whittington testified that, until Lovette had told him of Huffman's activities, he had not know that Huffman had been going around the plant attempting to encourage employees to support the Union. Whittington's testimony, contrary to Lovette, that he, in effect, was told that Church had harassed the two men rather than threatened violence is reflected in the language of the warning he gave to Church which merely refers generally to harassment.

Lovette, essentially corroborated by Whittington, testified that Whittington began the April 28 meeting by

repeating to Church what Lovette had told him about Church's having harassed the two unnamed employees. When Church denied the charges, Whittington told him that he was going to write him up on a warning slip and that, if this happened again, Church would be discharged. Church, however, refused to sign the warning form, as requested, and asked who the two employees were. Whittington replied that he was not going to tell him. As Church left, he said he knew who they were—that damned Eddie and Johnny. Nothing was said to Church during that meeting about handbilling or other union activities in which Church might have been engaged. Since that warning, Church, whom Whittington described as a satisfac-

tory worker, has not received any further discipline.

Lovette, however, became inconsistent on cross-examination. When Lovette assertedly first reported Church's asserted harassment of Huffman and Brown to Whittington, Huffman had not yet stayed home from work for the 3 days and was not yet aware that this wife had been threatened. Lovette also never learned whether Church had played any role in threatening Mrs. Huffman and it was only after, not before, he had spoken to Whittington on April 27 that Lovette had learned that two individuals besides Church had threatened Brown. Whittington, before issuing the warning to Church on April 28, had not personally investigated the com-

plaints of Brown and Huffman but had relied completely on what was said to him by Lovette. In addition, Eddie Dean Brown, called as a witness by the General Counsel, testified that when, in late April or early May, Lovette had asked him if Phillip Church had been harassing him, he had said no, ending the conversation.

Noting the inconsistencies between Lovette and Whittington as to what Lovette had reported about Church on April 27; that Lovette's testimony as to what he, personally, had been aware of concerning Church's conduct when he reported to Whittington was self-contradictory; that some of what Lovette originally was to have charged Church with having done on April 27 well could not have been

known to him by that date; and that Eddie Brown, an alleged harassment target, had directly contradicted Lovette's testimony, I credit Church's account of his April 28 meeting with Whittington and Lovette and conclude that the Respondents violated Section 8(a)(1) of the Act by orally threatening Church with the loss of his job if he continued his union handbilling. I further find that the written warning, also threatening discharge, was discriminatorily issued to Church because of his union activities, in violation of Section 8(a)(1) and (3) of the Act. In so concluding, I find no credible evidence that Church had harassed other employees to coerce them to stop working against the Union.

(e) Union insignia

Michael Sturgill, a live haul employee who had been with Holly Farms for about 4 years, testified that, while seeking regular assignment as a live haul driver, in mid-July[135] he wore at work a hat with the union insignia on it. About 10 minutes after he finished his shift, certain supervisors told him that they wanted to look at the hat and he laid it down on a vending machine. Ray Lovette called to Sturgill that if he was going to wear the hat, he should get it and get out the door. Sturgill picked up his hat and left.

Sturgill further testified that when he finished work on the next day

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[135] As noted, the representation election for the live haul unit was held on July 27.

David Minton, a superintendent in the live haul department, told him that he had jeopardized his career by wearing that hat. Sturgill was not wearing a union hat when Minton spoke to him.

Sturgill explained that when these incidents occurred, he basically worked as a chicken catcher, while aspiring to a permanent assignment as a live haul driver. At the time, he also filled in for absent live haul drivers, while waiting for a vacancy to develop. By the time of the hearing, Sturgill had become a live haul driver.

Sturgill agreed with Lovette's testimony that, from April through July, many Teamsters hats were passed out and, as Tyson caps also were

available, many employees wore one or the other. Both were baseball-type caps.

Lovette recalled that in late June, he did speak to Sturgill in the break area. While the shifts were changing, Lovette saw Sturgill wearing a baseball cap, standing with some other individuals near the water cooler. Sturgill, as Lovette approached, pulled off the cap and stuck in his shirt. Lovette related that he had told Sturgill that if he was going to wear that Teamsters cap, he should have enough guts to keep it on and not to jerk it off and hide it in his shirt when he saw Lovette coming. Neither said anything else. Lovette denied having told Sturgill or any other employee that if he was

going to wear the Teamsters cap to get it on and to get out of the door. Lovette explained that what he, in effect, had told Sturgill was that he did not have to hide his union hat. Lovette had not been aware of Sturgill's affinity for the Union and, as noted, many employees had been wearing union caps when he spoke to Sturgill.

Minton denied that he had spoken to Sturgill about his wearing a union cap, although he occasionally had seen Sturgill do so, and specifically denied ever having told Sturgill that wearing the union cap could affect his driving career, or words to that effect. Minton related that when the above incident was to have occurred, at the end of Sturgill's shift, there

was little overlap between his schedule and Sturgill's because they worked different hours.

It is not necessary to precisely resolve the details of any evidentiary conflict between what Lovette had said to Sturgill about his wearing a union hat because Lovette's own account of that incident indicated at least as much hostility as was described by Sturgill. A chilling effect on Sturgill would have resulted in either case. Contrary to Lovette's assessment, his statement to Sturgill, in the presence of others, that he should have the guts to keep the union hat on and not to pull it off and hide it when he saw Lovette coming, was no bland reassurance to Sturgill of his right to wear such a

hat, but was a strong expression of displeasure by the head of the department in which Sturgill then was seeking a better job, and was tantamount to prohibition. The harshness of Lovette's rebuke, even as he described it, was illustrated by his having publicly questioned Sturgill's courage. Either Sturgill's version or that of Lovette would have the inhibiting affect asserted by the General Counsel.

In the hostile anti-union atmosphere that existed, I credit Sturgill's further testimony concerning his encounter with Minton, who, as a live haul superintendent, reported directly to Lovette and which furthered Lovette's purpose. In so doing, I note that Sturgill's credi-

bility is enhanced by the risk taken in testifying against the Respondents' interest while he still was employed by them.[136]

In finding that the two incidents violated the Act, I note that while other employees also then wore union caps on the Respondents' premises, Sturgill's situation at the time was particularly sensitive because he then was hoping to receive an appointment as a regular live haul driver. In this, he was vulnerable to the pressures described because the chicken catching work which Sturgill then was seeking to escape was difficult and unpleasant. As described, this assignment involved go-

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[136] See Rodeway Inn of Las Vegas, 252 NLRB 344, 346; Gold Standard Enterprises, Inc., 234 NLRB 618, 619.

ing to the farms where the chickens were raised where, under cover of darkness, he and the other chicken catchers would continuously catch chickens with their hands and cage them during shifts of indeterminate duration, which continued until the task was completed. The live haul drivers, whose ranks Sturgill then hoped to join, did not themselves catch chickens but merely operated the vehicles that transported the crews, the caged chickens and any other relevant equipment. While, arguably, the quality of Sturgill's life could have been materially improved by advancement from chicken catcher to live haul driver, it is unlikely that he could have received

such a position over Lovette's objection.

The Board has held that when an Employer restricts its employees' right to wear union insignia at work, it is the Employer's burden to establish that special circumstances exist which make the rule necessary, such as in order to maintain production or to ensure safety.[137] Here, both incidents occurred after Sturgill had finished work and the Respondents have made no such showing.

Accordingly, I find that the Respondents violated Section 8(a)(1) of the Act, respectively, by Lovette's admitted conduct which effectively prohibited the wearing of union in-

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[137] The Kroger Co., et al., 284 NLRB 663, 684.

signia, and by Minton's threat of retaliation for wearing such insignia.[138]

(f) By Dean Grimes

Live haul employee Clyde Lunsford[139] testified that on July 24, 3 days before the representation election, he was operating a forklift at one of the chicken farms when his supervisor, Dean Grimes, mounted the side of his forklift and told Lunsford that (live haul driver) Phillip Church probably would be fired if the Union did not get in.

Grimes, in turn, did not recall having spoken to Lunsford about the

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[138] Pak-More Manufacturing Company, 241 NLRB 801, 803.

[139] Lunsford, who intermittently has worked for Holly Farms for about 25 years, basically running a loader, still was employed by the Respondents at the time of the hearing.

Union in 1989, and, although he regularly got into Lunsford's loader to tell him what he wanted done, Grimes denied having told Lunsford that Church would be fired if the Union did not get in.

While, again, in a one-on-one situation, the credibility issues are not free from doubt, particularly where the alleged incident involves a supervisor who was not party to any other alleged unlawful conduct, I, nonetheless, credit Lunsford. In so doing, I note that Lunsford was a longtime employee of the Respondents who, when he testified, was still in the Respondent's employ under Grimes' supervision. I, therefor, find that Lunsford's credibility was enhanced by his willingness to jeopardize his

economic interest to testify against his employer.[140] I further note that Phillip Church's pro-union activities were well known to management, including to Grimes, and that Church had been the target of other Respondents' unfair labor practices, including coercive interrogation, threats and an unlawful written warning. It also has been found above that Ray Lovette, in April, had unlawfully solicited grievances from Church, which, as promised, he had remedied.

For the above reasons, including that Grimes' threat described by Lunsford as consistent with the Respondents' pattern of union animus

[140] Rodeway Inn of Las Vegas, supra; Gold Standard Enterprises, Inc., et al., supra.

directed, in good part, against Phillip Church, I conclude that the Respondents violated Section 8(a)(1) of the Act by Grimes' statement to Lunsford to the effect that Church would lose his job if the employees did not select the Union.

(g) Raymond (Bob) Johnson

Packing department employee Geneva Moore Tilley, employed in the Wilkesboro main plant's fresh processing operation, testified that, on November 9, she and another employee, Phyllis Roberts, were handbilling for the Union outside the Respondent's Convenience Foods facility,[141] located just across a Company street from the main processing plant. From

[141] Convenience Foods, a colloquialism for the Tyson Food Service plant, prepares frozen and fast foods for institutional use.

where they stood on the parking lot sidewalk, about 20 to 25 feet from a stairway leading to a platformed entryway, Tilley saw supervisor Raymond (Bob) Johnson[142] standing on that platform with three other unidentified men. Tilley heard Johnson say to one of the men, "Well, here comes the Teamsters Union again, handbilling." Tilley related that she looked at Johnson but continued to pass out handbills. Johnson then told the man, "Yes, sir, here they are again for Teamsters Union 391. They should all be fired. If I were to catch any of my employees handbilling or even talking about the Teamsters Union, I

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[142] Johnson, a Convenience Foods supervisor, had held his position for about 3 years at the time of the hearing.

would fire them or see to it that they would get fired."

Tilley asked if Phyllis Roberts had heard what Johnson had said, but Roberts replied that she had not, having then been talking to one of the employees. The two women then left the area.

Tilley previously had not known Johnson, learning his name only later, but recognized him as a supervisor and the other men as Convenience Foods employees by their respective uniforms. Holly Farms' supervisors, as did Johnson, wore white jackets and navy blue trousers.

Johnson denied both knowing Tilley and having made the anti-Teamsters remarks threatening discharge attributed to him by Tilley. Johnson knew

Wilma Wagner and Phyllis Roberts, employees who, he related, more frequently had given out union literature near the foot of the platform where he had stood. An entrance atop the platform opened to the Convenience Foods plant where he worked. Johnson explained that his duties required that he be on the platform each day. After he and another supervisor punched out the timecards for some 100 employees at the end of their shift—at around 3:15 p.m.—he was responsible for checking the break room, the bathroom areas and the plant exterior to ensure that there was no interruption in the flow of traffic and that those areas were clean. Accordingly, barring special circumstances, Johnson was on that

platform almost every afternoon at that time to check the outside areas and, also, to talk to his people as they left to hear their problems and answer their questions. Normally, one to three other men would join him there. These were employees who either were leaving and waiting for a ride, or who had arrived early for work.

Johnson recalled that when Wagner and Roberts first began to give out union literature near the platform stairs, Roberts had told him that he should go back inside because he was intimidating the people who were coming by and, in effect, was interfering with her distributions. Johnson replied that he did not feel that he was doing the intimidating; she was

the one who was acting differently by being out there, because he was there every day. Roberts, according to Johnson, in so commenting did not refer to anything Johnson had said to any employee. He reiterated his denial of having made the statements described by Tilley.

The general evidence surrounding this incident does not support Tilley's account. Roberts who, according to Johnson's uncontroverted testimony in this area, handbilled regularly in his presence, had not been menaced by Johnson or, at least, did not testify to that affect, and Tilley, at a distance of 20 to 25 feet from Johnson when this incident was to have occurred, might well have been out of hearing range. This is

particularly true if, as described, she had been busy handing out union literature at the time. In evaluating the conflicting testimony, I note Johnson's candor in taking the initiative to testify that Roberts had accused him of intimidating employees who might pass receive literature and that he had declined her request to avoid this by going back inside. In such circumstances, however, Johnson's mere observation of employees' handbilling on Company premises, without more, would not constitute unlawful surveillance. The Board has held that "[u]nion representatives and employees who choose to engage in their union activities at the Employer's premises should have no cause to

complain that management observes them."[143] Noting that neither Johnson nor Tilley knew each other on the day in question; that Roberts, apparently, often had joined in handbilling at that location in Johnson's presence without unlawful incident; that Roberts did not corroborate Tilley; and that Johnson was not involved in any other form of unlawful conduct in this proceeding, I find that the weight of the evidence does not support Tilley's account and, therefor, it is concluded that Johnson did not make the unlawful statements attributed to him. In so finding, I note that while Tilley's testimony like that of certain other

[143] Porta Systems Corporation, 238 NLRB 192, fn. 4, and cases cited therein. Also see Southwire Company, 277 NLRB 377, 378.

witnesses, was deserving of greater respect by virtue of her continued employment by the Respondents at the time of the hearing and, accordingly, had testified against her own pecuniary interest,[144] this was but one of several credibility factors, which, in my view, did not overcome other considerations indicating that the Act had not been violated.

(h) Removal of pro-union literature from Company bulletin boards

Live haul driver Dennis Dimmette testified that the Company allowed its employees to post notices on the several bulletin boards in the live haul department and that he had been among those who had exercised that privilege. Dimmette related that on

[144] Rodeway Inn of Las Vegas, supra; Gold Standard Enterprises, Inc., et al.

several occasions between March and July, while the representation election petition for the live haul unit was pending, he posted union notices on those bulletin boards. While such notices might have been permitted to stay up all night, they somehow were removed by the time the first shift workers arrived at around 7 or 8 a.m. Although Dimmette never saw anyone take them down, the notices he posted never remained up for more than a day. On the other hand, other posted notices, such as those relating to items for sale or miscellaneous announcements unrelated to the Union were left alone. In view of Dimmette's testimony describing repeated removal of notices posted by him, the burden passed to the Respondents, who

controlled the bulletin boards to enter a denial or an explanation, which they did not do.

From Dimmette's uncontroverted testimony, I find that the Respondents violated Section 8(a)(1) of the Act by discriminatorily excluding pro-union literature from their live haul department bulletin boards before the election while, at the same time, leaving undisturbed other posted notices not germane to the Union.[145]

(i) Unilateral changes in absenteeism and pension policies—facts

Dimmette testified, also without contradiction that, on October 1, the Respondents unilaterally changed the existing policy requirement as to

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[145] Marathon Le Tourneau Company, Longview Division, 256 NLRB 350, 357-358.

when absent live haul employees must call the Company to report their status.[146] On October 1, this policy was changed to require that any employee who was absent for 2 days must call in or be terminated. Before this change, live haul employees had been required to call the Respondents only after they were absent for 3 days.

Dimmette further testified that, during the second week of December, he received a letter from the Respondents, which he did not retain. He related that this letter had announced that the Holly Farms retirement plan would be terminated in September 1991 when it would be paid out. Dimmette does not recall who signed that letter.

[146] Unlike most other above alleged violations of Section 8(a)(1) of the Act, this incident, which occurred on or after October 1, relates to the period after Tyson assumed control of Holly Farms.

In mid-January 1990, however, Dimmette attended a meeting conducted by personnel manager Barbara Mathis where the pension plan was discussed. Also present were Ray Lovette, Jerry Tilton of personnel and all the night shift live haul supervisors and employees. Mathis gave the employees the status of the retirement plan, explaining how much money was in the plan and announced that in September 1991, the plan would be terminated and the employees paid off. This was followed by a question and answer session. As Dimmette recalled, no questions were asked about the

changes in retirement, but some were raised about other matters.

Lankford, on the matter of retirement policies, testified that when he had given his April 12 speech to groups of live haul employees, he answered employee questions. With respect to an employee inquiry as to what would happen to the pension plan in the event of a takeover of the type discussed in that address, Lankford had told the employees there, and at other meetings where that speech was read, that the pension plan was something that the employees owned which nobody could take away from them. If the Company was sold, the employees' vested interest in the plan was theirs and could not be taken away whether the Company was

sold to Tyson or Conagra[147]—no matter what happened to Holly Farms.

Lankford also told the employees at those sessions that if Tyson bought Holly Farms, there was a good chance that Tyson would terminate the Holly Farms pension plan and put in their own plan, different from that of Holly Farms. On the other hand, if Conagra won the bidding process, there was a good chance that the Company would leave the Holly Farms pension plan in place exactly as it then was.

Since the alleged unilateral changes concerning absenteeism and pensions relate to bargaining and took place after Tyson became the

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[147] Conagra, Inc., a large food company, had been Tyson's principal rival in its efforts to acquire Holly Farms.

Respondents' principal, these issues will be considered below in the discussion of the bargaining relationship between Tyson and the Union.

3. The alleged Section 8(a)(3) violations

(a)(i) The discharges of four plant employees—parties' position

The General Counsel and Union contend that in March and April, Holly Farms terminated four of its plant workers, Alvin Bouchelle, Patricia Barker, Raymond K. Huffman, Jr., and Joe Richardson, because of their union activities. These parties argue that the Respondents' position that Bouchelle, Barker, and Huffman were discharged because they had violated the Company's rule against soliciting in work areas during working times was pretextual because sales

and other solicitations in work areas during work times long had been rampant throughout the Respondents' plants. Only Bouchelle, Barker and Huffman, as union activists, had been singled out for discharge.

The Respondents concede that Richardson was terminated for his union activities, but argue that such action was justified and that Richardson was unprotected by the Act because he then was a supervisor within the statutory definition. The General Counsel and Union deny Richardson's asserted supervisory status.

(ii) The discharge of Alvin Bouchelle—facts

Bouchelle[148] testified that on March 31, as he arrived for work, his department head, plant engineer Marion McKinley (AL) Bare, summoned him to the office of Robert Pipes, second shift plant superintendent. Bouchelle met there with Pipes, Bare, and David Fairchild, the plant manager. Bare asked if Bouchelle had been involved in any union activity. Bouchelle told him yes, that he had been soliciting signatures for union cards in the upstairs non-work area. Bare told Bouchelle that he had an eyewitness who had stated that Bouchelle had passed out union cards down-

[148] Bouchelle had been employed by Holly Farms as a maintenance employee in the Wilkesboro food service plant since May 19, 1986.

stairs, which Bouchelle denied.[149] Bare continued that Bouchelle had been charged with a serious violation of Company policy and that he had no choice but to terminate him. Bouchelle was not told in the course of that interview the names of any employees with whom he was to have interfered. Bouchelle did not reply and was escorted from the plant.

The Company's personnel change of status (discharge) form, dated March 31, signed by Al Bare, as department head, and Dan Spears, as supervisor, set forth the following explanation for the discharge:

[149] The food service plant was a two-story building with production facilities located on the first floor and, a break room, dry storage, offices and the quality control laboratory on the second floor. The first floor generally was considered a work area where the Respondents contend that solicitation was prohibited.

> Alvin has been disrupting employees from doing there [sic] job by soliciting union membership while down in the plant on the job.

Another item on this form, as to whether the signatory supervisors would rehire this employee, was checked "no" because of Bouchelle's disregard for Company policy. However, the supervisors wrote that they would consider rehiring Bouchelle under certain conditions in the future, "if we get assurance that he understands and will abide by company policy."

Bouchelle testified that he had solicited many employees to sign authorization cards during the Union's campaign. Most were approached in the upstairs break and non-work areas, and while they were entering

the plant. He also had solicited four or five employees to sign authorization cards downstairs in the work area, during worktime, but not while they actually were working. Such employees, when solicited downstairs, were in the hallways, in the maintenance shop, or in production areas while the lines were down. Bouchelle testified that most of the people he spoke to initially had asked him for the union cards, but not while he was at work.

Bouchelle's maintenance duties required that he move about the plant. While his main job was to maintain the fry lines where chicken was cooked, his work, which included welding and all types of repairs, took him all over.

Bouchelle testified, as did other employees, that there long had been solicitation by supervisors and employees in all plant areas. Products such as girl scout cookies, Avon products, raffle tickets and tickets for community events were regularly sold. He related that on several occasions after he had begun work on his second shift, first shift employees still in the plant asked him to buy raffle tickets.[150] Bouchelle related that, while supervisors were in the area during working time and in the work place, he had purchased raffle tickets from employee Tony Miller, another named employee and from

[150] The second shift, to which Bouchelle had been assigned, with some fluctuation, worked from between 3 to 3:30 p.m. until 12 to 12:30 a.m. Sometimes the shift continued until 1 a.m.

several other employees at unrecalled dates. So extensive were these sales that Bouchelle had not known there were restrictions on solicitations or on the distribution of literature. No supervisor ever had told him not to buy a raffle ticket in the work area.

Lankford denied having known of any breaches of Company policy, including described sales by a supervisor of Christmas ornaments and poker games. He explained that such sales and poker games during worktime were against the rules but that it was not contrary to Company policy to sell items in the bathroom. Sales of raffle tickets or other work items would be appropriate as long as such sales did not interfere with work.

Quality control employee Tony Miller, called by the Respondents, testified that, in November 1987, he had sold Bouchelle raffle tickets sponsored by a volunteer fire department of which Miller was a member. This transaction occurred by the sink in the front area of the plant while Miller, a first shift employee, was leaving work and Bouchelle was arriving for work on the second shift.

Miller related that he has sold raffle tickets only in the break room and to employees in hallways coming from or going to the break room. He did sell Bouchelle raffle tickets on one or two earlier occasions but does not recall having sold them to him at any place but at the sink. Miller also has sold raffle tickets to em-

ployees when they came to work in the second floor quality control laboratory area, where he kept supplies. Miller's supervisor, David Taylor, also has purchased a raffle ticket from him in that laboratory. Miller never was reprimanded or disciplined for selling raffle tickets in the laboratory.

Bobby Ray Garris, identified by Bouchelle as a supervisor[151] who might have seen him buy raffle tickets in the work area, denied that he had observed any employee selling or buying items in the work area. Garris also did not participate in sports pools.

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[151] Garris, a former fry line supervisor, had been a rank-and-file employee since September, after Bouchelle's discharge.

Bare testified that as plant engineer at the food service plant, Wilkesboro, he was responsible for the plant, mechanically and structurally. Bare was assisted by a maintenance crew.

In March, Bouchelle was a maintenance lineman who took care of fried chicken lines 1, 2 and 3 and, if called, also took care of line 4. Lines 1, 2 and 3 occupied areas of about 100 feet in length and the four lines together occupied slightly less than 25 percent of the overall plant area.

Bare testified that, during a conversation with plant manager David Fairchild; Joe Griffin, then vice-president of production; and Robert Pipes, second shift superintendent,

one of the foregoing had told Bare that employee Ray Hunt had reported through a supervisory chain of command reaching to Pipes, that on March 29 Bouchelle had aggravated Hunt by trying to get him to sign a union card. Bare asked where this had taken place and was told that it had occurred in the hall in front of the maintenance shop.[152] Bare asked what they were supposed to do about Bouchelle. Griffin replied that Bouchelle should be terminated if he had been doing this and told Bare to call

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[152] Bare testified that at a meeting held sometime before March 31, supervisors had been notified that plant personnel were to be advised that they could engage in union activities in the upstairs break area and in the outside areas. Bare did not testify as to whether this information was subsequently conveyed to the employees.

in Bouchelle to talk to him and to get his side of the story.[153]

That afternoon, Bare called Bouchelle to Pipes' office where he met with Bouchelle and Pipes.

When Bouchelle entered, Bare asked if Bouchelle had been handing out union literature and cards in the plant during work hours; bothering employees while they were working. When Bouchelle asked where, Bare replied around the maintenance shop.

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[153] As related to Bare by either Griffin or Fairchild, Hunt had been on his way from one job to another when Bouchelle stopped him and asked him to sign a union card in an area between the offices and line 4. When Hunt replied that he did not want to sign a union card and that Bouchelle should let him alone, Bouchelle reportedly had told Hunt to take one anyway, to read it over and to think about it. Since Bare did not conduct any investigation by speaking to Hunt or to any of the supervisors who had passed along his complaint before acting against Bouchelle on this information, he did not know whether Hunt had been on break or in an assigned work area when Bouchelle approached him.

Bouchelle answered that he had only given Ricky Prevette, a third shift maintenance employee, some papers. Bare told Bouchelle that he had been told that Bouchelle had handed out things besides that outside of the maintenance shop. Bouchelle did not answer. Bare told Bouchelle that he was asking him to either quit or be dismissed. Bouchelle told Bare that he did not believe this was occurring "just for that." Bare stated that, as Bouchelle knew, he had been told just the other day that he was not supposed to be doing such things during work hours and in the work areas. A place had been provided for such purpose.[154]

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[154] Fairchild testified, contrary to Bouchelle, that he had not been present at Bou-
(continued...)

According to Bare, Bouchelle replied that he did not think Bare should fire him for this. Bare answered that if Bouchelle did not like what the Company was going to do, he could take it to the Labor Board; Bare thought that the Company's actions were right. Bare accompanied Bouchelle to the maintenance shop where Bouchelle turned in his tools and gathered his personal belongings. Bare helped carry his stuff. When they got to the guard house, Bouchelle told Bare that he was the best boss that he ever had; that this had been the best job he ever had; and asked Bare for a job recommendation,

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[154](...continued)
chelle's terminal interview because away on vacation. He had learned of and approved the discharge after receiving Bare's report upon his return.

which Bare readily agreed to provide. He had considered Bouchelle to be a good employee.[155]

(iii) Prohibition on discussing pay rates with other employees—affecting Bouchelle —facts and conclusions

The General Counsel further contends that the Respondents had violated Section 8(a)(1) of the Act by Fairchild's admonitions to Bouchelle about 1 week before his discharge that it was against Company policy for him to discuss his wages with

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[155] Bare testified that he, too, had seen raffle tickets and other community type organization tickets, such as those sponsored by the Rotary Club, sold in the plant and, before 1989, had seen girl scout cookies sold in the hallway to individuals who were going to or from the break room. In 1988, he had seen employee Tony Miller sell raffle tickets in the first floor hallway at the foot of steps descending from the second floor break room. Bare had not spoken to Miller at the time about this.

Within the preceding 5 years, Bare had seen employees both selling and buying items in the plant when those employees were supposed to have been working.

other employees. In this regard, Bare testified that at the end of Bouchelle's terminal March 31 interview, he reminded Bouchelle about the trouble he had had with him a few weeks before. This was in reference to Bouchelle's complaint at the time about his wages. Bouchelle, in this regard, testified that about 1 week before his discharge, he had spoken to Pipes, Fairchild and Bare in Fairchild's office. Bouchelle told the three supervisors that he was not receiving the top pay in his job. He had discussed his wages with other employees who, as matters developed, were getting top pay although Bouchelle had been with Holly Farms longer than they. Fairchild told Bouchelle that he, in fact, was re-

ceiving the maximum pay for his job and that it was against Company policy for him to have discussed his wages with other employees. Bouchelle replied that such a restriction was not in the handbook. Fairchild informed Bouchelle that everything was not in the handbook and told him not to be talking about pay with other employees because it would cause dissension. Fairchild repeated that it was against Company policy for Bouchelle to discuss wages with other employees.

Plant manager Fairchild testified that he had directed that the meeting with Bouchelle be held after supervision had reported that Bouchelle was complaining inside the plant that he was not receiving top pay and was

earning less money than another maintenance employee with less time on the job. Accordingly, about 2 weeks to a month before Bouchelle's termination, Fairchild met in his office with Bouchelle, Pipes and Bare. Fairchild testified that he began by asking if Bouchelle was having a problem with his wages. Bouchelle said that he was; that he had been working for Bare for something like 2 years; that he was not on top pay and that there were other people earning more than himself. When asked what gave Bouchelle this idea, he replied that other maintenance employees had told him so. Fairchild replied that these others could have told him anything, they did not have to tell him the truth. Bare asked Bouchelle how

long this had been going on and Pipes, in turn, told Fairchild that Bouchelle had been talking to other people about Bare not having put him on top pay for the last month or two.

When Fairchild asked Bouchelle why he had not talked this over with him, if he felt that he had a problem talking with Bare, Bouchelle replied that he did not want Bare to get the idea that he was talking about him behind his back. Bare became upset, retorting that Bouchelle had been talking behind his back to everybody in the house; what was the difference? Fairchild smoothed the situation and asked Bouchelle what proof he had that he was not making top money. Bouchelle did not know what he was earning but stated that he

thought he was making $6 or $7.69 an hour and that everybody else was earning more. Fairchild told Bouchelle that he was on top pay, that he was receiving the $7.79 an hour maximum that was being paid at that time in maintenance. When Bouchelle questioned this, Fairchild told him that he could prove it and showed Bouchelle a computer printout substantiating what he had stated. When Bouchelle said that the computer printout was wrong, Fairchild asked if Bouchelle had ever looked at his pay vouchers, his check stubs. Fairchild reassured Bouchelle that the printout told him what he was earning.

After the meeting, was over, Fairchild told Bouchelle that the entire

problem could have been avoided if he had first discussed this matter with his supervisor. Fairchild told Bouchelle that he always had someone to go to. If his supervisor told him something with which he neither agreed nor understood, he always could go Fairchild. If Fairchild could not understand the problem, he could go to Fairchild's boss.

In response to Bouchelle's testimony that Fairchild had told him that it was against Company policy for him to have discussed his wages with other employees, Fairchild related that he merely had told Bouchelle on that occasion that it was not a good idea for him to talk to other people about his wages because they could tell him anything. Fairchild denied

having directed Bouchelle not to talk to others about his pay or that there was no rule or policy at the food service plant prohibiting employees from talking about pay rates. Employees talked about them all the time. He had suggested to Bouchelle only that others with incomplete information might mislead him and that the problem could have been avoided if he had spoken to a supervisor.

In crediting Bouchelle's testimony that Fairchild had told him that it was against Company policy for him to discuss his wages with other employees, I note that Fairchild's testimony that he simply had cautioned Bouchelle not to talk to other employees on this matter so as to avoid being misled was countered by Bare's

testimony that, weeks later at Bouchelle's terminal interview, Bare had reminded Bouchelle of "the trouble" he had had with him during that earlier conversation on the matter of wages. The incident apparently had registered sufficiently to have been raised by supervision weeks later when Bouchelle was being discharged. Noting, too, that Fairchild, in addition to approving Bouchelle's termination, also was involved, below, in the unlawful discharge of Joseph Richardson, admittedly for union activities, I accept Bouchelle's testimony concerning this incident as the most credible and find that the Respondents violated Section 8(a)(1) of the Act when Fairchild prohibited Bouchelle from discussing his wages

with other co-workers because violative of Company policy.

As noted by Administrative Law Judge Leiner in his Board-approved decision in Independent Stations Co.,[156] the establishment of such a rule, "without regard to circumstances relating to time, place or opportunity . . . prohibits employees from engaging in 'mutual aid or protection,' the very substance of the activities protected in Section 7 of the Act. . . . [It is] of no legal consequence that the rule did not contain within its terms the admonition that violation would lead to dismissal. The mere existence of the rule prohibiting protected conduct,

[156] 284 NLRB 394, 396-397. Also see Jeannette Corp., 217 NLRB 653, 653-654, 656, enfd. 532 F.2d 916 (C.A. 3, 1976).

even if not enforced, constitutes unlawful interference in violation of Section 8(a)(1) of the Act.

(iv) The discharge of Patricia Barker—facts

Patricia Barker[157] testified that, on April 11, about 5 minutes before the end of her shift, David Eller, her supervisor, holding her timecard, told Barker to accompany him upstairs. There, she met in the personnel office with Mary Barnes, second shift personnel manager; Eller; and Jerry Blevins, second shift plant superintendent. Barnes stated that she had heard that Barker had been

[157] Barker, first employed by Holly Farms from August 1982 until August 1988, resigned to take other employment. She returned to Holly Farms in December 1988 where she remained until terminated. When employed for the second time, Barker worked in the fillet department of the main processing plant, Wilkesboro, during the second shift.

handing out union cards during worktime. When Barker answered that this was a lie, Barnes countered that she had proof that Barker had done this. Barker asked where was the proof, repeating this request several times, and declaring that she had done her job. Barnes replied that no one was saying that Barker had not done her job but that Barker was being discharged for union activities. Barker left, slamming the door.[158]

The Holly Farms personnel change of status (discharge) form, issued April 11 and signed by Barnes gave as reason for the action taken: "Viola-

[158] Barker testified that the only thing that Eller had said to her while en route to the personnel office was that this was not of his doing. At that time, she did not know what he was talking about.

tion of known company rule - soliciting."

On March 7, only about 1 month earlier, Barker had received a 21 cent per hour pay raise for having accepted a higher-paid job of filleting chicken thighs at the suggestion of her supervisor, Eller. Previously, Barker had been packing thighs. As noted, the Respondents do not contend that Barker was terminated because of her job performance.

Barker testified that, although involved with the union campaign at the plant, she never had distributed union authorization cards during worktime. However, about 1 week before her termination, Barker had had a number of conversations in the plant with an employee named Rachel,

later identified as Virginia Rachel Wyatt. One such conversation had taken place in the hallway when Rachel, according to Barker, asked if Barker had been to a union meeting. When Barker said yes, Rachel wanted to know about the Union. Barker told her as much as she knew. Rachel again also asked Barker for information about the Union while Barker was working. Accordingly, at Rachel's request and during a break taken near Barker's locker, Barker wrote the telephone number of the union representative. After the break, she slipped the telephone number into Rachel's pocket. No one else was in the area at the time.

Barker related that when, in December 1988, she had returned to Hol-

ly Farms' employ, her supervisor, Eller, was selling Christmas tree ornaments made by his wife on the line while she was at work helping to pack chicken breasts.

She testified that during her first period of employment with Holly Farms, her then-supervisor, Shelton Goddard, had sold knives to employees while they worked on the line and, during her second period, it was very common to see the distribution of Avon and Tupperware books and solicitations for football pools during worktime. The football pool was a weekly event. In addition, an employee in Barker's department, known as Mama Sadie, sold homemade foodstuffs during worktime and employees would send money to her by a floorboy

or else run over themselves to personally buy items when they should have been working. However, about a week before her termination, when Barker was going to make a purchase from Mama Sadie, she was told that Mama Sadie no longer was allowed to sell her goods while the employees were at work and now kept her supplies in the office or upstairs. Barker has seen Eller buy items from Mama Sadie, whom Barker described as a good cook.

Barker's testimony concerning the frequency of unauthorized activities by employees in the work place during worktime which were unrelated to the Union, was corroborated by Carol Eller, a Holly Farms' production em-

ployee for more than 17 years.[159] Eller testified that since she had been working at the Holly Farms main processing plant, employees have sold many items. While working on the line, employees would solicit purchases by other employees of Tupperware and of items shown in Home Interiors or Princess House catalogues. Also, the children of many employees attended various schools that sponsored sales. Eller personally has bought many items or sold Tupperware during worktime and in work areas on her 8 a.m. to 4:30 p.m. shift. During her worktime and in her work

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[159] Carol Eller began her employment at Holly Farms by hanging chickens. When that job was eliminated, she moved to line 3 where she cut drumsticks for 15 years. When chicken cutting became computerized, she returned to hanging chickens in the packing department under supervisor Ray Owens.

area, Eller, during the week before her testimony, purchased girl scouts cookies. Although she was working at the time, Eller was not disciplined. She believed that her supervisor, Ray Owens, also, may have bought some cookies because the vendor showed them to him, as well.

Eller identified a series of six photographs taken inside the main plant. Five of these photographs, which were taken in the ladies' restroom, showed sale items on display. Only one photograph was taken on the production line. This showed an employee, Nancy Ann Anderson, reading a Home Interior catalogue on the production line while another employee standing next to her apparently was working. Anderson was shown in the

photograph as reading the magazine with her back turned to the production line. Eller explained that this production line picture was taken after Eller, having noticed that Anderson was standing on the line reading the magazine, told the lady working near her that it was too bad they did not have a camera to prove that solicitation was going on at Holly Farms. Her neighbor volunteered that she did have a camera in her car. At Eller's suggestion, the other employee left the production plant, went to her car and returned about 3 minutes later with a camera which she handed Eller. Eller told her neighbor that she did not know how to use a 35 millimeter camera. Her neighbor instructed her to push the button and

returned to work. Eller turned around and took the picture of Anderson who had continued to read the magazine for about 5 or 6 minutes. Eller underscored that the lady who had worked next to her had felt free to leave the production line, to go to her car and to return with the camera although not on break. While this other employee was getting her camera, Eller did both of their jobs.

Anderson, the employee portrayed in the photograph and called as a Respondents' witness, explained that she had examined the catalogue during a slow time in her work routine. Anderson's job at the time had been to keep the chicken bins, which were fed from a drop chute, from holding too many birds so as to prevent the

chute from stopping up and tearing the product. Before starting work that day, Anderson had agreed to the request of Victoria Johnson, the employee at the next work station, to look at Johnson's Home Interiors catalogue. About an hour after the shift began, Anderson, noting that the bins were in good shape, began to look at the catalogue which Johnson had placed near her. As it was Anderson's job to make sure that Johnson, who was hanging chickens, had enough birds to hang, Anderson conceded that she should have been turned around facing the line in the same direction as Johnson when the picture was taken. Anderson agreed that Company policy forbade selling, buying or looking at books while em-

ployees are supposed to be working and she is not aware of any other occasions, except for that shown in the picture, when employees had engaged in such conduct. Anderson testified, however, that her own supervisor, who had not been there at the time, could not have observed her.

When, 3 or 4 days later, Carol Eller had brought in the photograph and showed it to her, Anderson asked why Eller had taken the picture. Eller replied that she had a scrapbook of all of her friends and wanted to take a picture of her and put it in the scrapbook.[160]

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[160] The supervisors to whom Anderson and Eller reported testified that they were in their respective areas at the time and did not observe the above events. Both agreed that picture-taking and examining literature at the work place during worktime were against Company policy.

Anderson has continued in the Respondents' employ and there is no evidence that she was disciplined for her conduct shown in the photograph.

The record reveals that Barker's termination was precipitated by a complaint from employee Virginia Rachel Wyatt. Wyatt, assigned to pack chicken parts, testified that Barker had worked in the fillet department about 5 feet in front of her. Wyatt testified that on three occasions, Barker had stopped working and had come down the line to interrupt her on the job to tell Wyatt that she should sign a union card.

Wyatt recalled that Barker first came to her work station at an unrecalled time after the start of the Union's campaign and asked Wyatt,

then working, if she had signed up for the Union. Wyatt noted that Barker, too, should have been working at the time. Barker returned to Wyatt's station later in the same shift and again asked if Wyatt would be interested in signing a union card. Wyatt did not answer.

Wyatt related that, on the next night, Barker stuck a paper with a name and telephone number on it in Wyatt's pocket, telling Wyatt that it was the name of the Union and the telephone number where Wyatt could get in touch with them. This third incident occurred while Wyatt again was working and at a time when, as Wyatt testified, Barker, too, should have been working.

Thereafter, on the Monday following a Saturday union meeting, Barker told Wyatt on the stairs that she had been missed at the meeting.

Wyatt, thereafter described the incidents concerning Barker to personnel manager Barbara Mathis, who asked Wyatt to give a written statement that Barker had approached her several times concerning the Union. Wyatt denied having asked Barker for any union materials or for the Union's telephone number, which number she gave to Mathis when making the statement.

Wyatt averred that, during the preceding 5 years, no one had approached her on the line to request that she do anything not related to work. She has not seen employees at-

tempting to sell or pass any type of material to other employees on the line and no one had approached her for such purposes. Employees at work were allowed to talk to employees next to them if they could hear and understand what the other employee is saying. Wyatt, personally, had never spoken to those working next to her but had overheard conversations between other employees.

in February 1990, Wyatt, who had been working in the main plant fillet department for about 2 years, packing thighs, was moved to the packing department where she packed chicken parts. Since she no longer was required to trim out shattered bones left in the parts that she packs, her new job, which is paid at the same

rate, is easier on her than were her duties in the fillet department.[161]

Mary Barnes, second shift personnel manager, testified that, on April 11, personnel manager Barbara Mathis, to whom Barnes reported, had remained on duty for part of the second shift. At that time, Mathis told Barnes that Wyatt had signed a statement, in Mathis' possession, stating that Patricia Barker had asked Wyatt to join the Union. Mathis told Barnes that, if necessary, she would stay and take care of this matter, but preferred that it be taken care of by the second shift. Barnes read the statement referred to by Mathis

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[161] I find no evidence that Wyatt's new, less physically demanding job was a reward for having cooperated with the Company.

but did not personally investigate Wyatt's charges against Barker.

Barnes asked Barker's supervisor, David Eller, to bring Barker to the personnel office. Also present at the time were Jerry Blevins, the second shift plant superintendent and Eller, neither of whom said anything during the interview.

Barnes told Barker that it had been brought to her attention that Barker had been soliciting for the Union during worktime, at her work area, and that Barker was being terminated for having interfered with the work of another employee by soliciting for the Union. Barker replied that she did not understand what Barnes was saying. Barnes told Barker that she had a statement,

which Barker asked to see. Barnes, who did not identify the complainant, told Barker that she did not have the statement at her disposal at the time but that if she needed to see it, she could go to Barbara Mathis. Barker left the office without further response.

Barnes testified that although Holly Farms, depending upon the situation, had a system of progressive discipline whereby discharges were preceded by a series of oral, then written, warnings, no consideration was given to discipline less severe than discharge for Barker even though she was a well-regarded employee who had received a higher paying job and

accompanying pay raise only about a month before.[162]

(v) The discharge of Raymond K. Huffman, Jr.—facts

Raymond Huffman[163] testified that on April 7, Luke Roten, his immediate supervisor told him that Barbara

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[162] Sadie Mae (Mama Sadie) Vannoy, a fillet department employee, testified that for the past 20 years she had been selling various food items, including homemade sandwiches, cake, candy and pies, in a hallway separated from the fillet room by a wall. During the years that she has been doing this, she always had sold these items in the same place and only during her break time. If foodstuffs were left over, at the end of her work shift, she would set another display in the hallway where employees could make purchases as they left. She did this while waiting after the end of her shift for her son to finish work and pick her up. No Company representative ever had spoken to Vannoy about items she sold in the hallways. She did not know about the purchase and sale of other items or of football pools, and was aware only of her own business.

[163] Huffman was employed by Holly Farms for 10 1/2 as a floor-boy in the eviscerating department, main processing plant. His duties involved keeping the lines supplied with chicken parts and paper towels and helping to roll out barrels of discarded waste. Huffman was expected to leave his area to go to other departments for supplies and to help keep the floors clean.

Mathis, the personnel manager, wanted to see him. Accordingly, he met with Mathis in her office. Also present were main plant manager Harold Eller; Gary Hamby, processing superintendent, first shift; and Huffman's supervisor, Roten. When Huffman entered the office, Mathis asked if he knew the Holly Farms' Company policy. When Huffman said yes, Mathis told him that the Company had a statement saying that Huffman had been harassing somebody on the line about union cards; that Huffman had been going person to person, line to line, about the Union; and that he now was being terminated. Huffman told Mathis that he was not for the Union right then and asked the Company to reconsider and give him his job because he

needed it. Mathis shook her head and said that they could not do that. She told Huffman to leave and that a guard would escort him out the door, but that he could come back for his check on the following Friday at which time he could bring in his uniforms. Other than that, the Company would have him arrested if he returned to its property.

Huffman testified that, before the start of the union campaign, the Company had not restricted him from engaging in discussions in the work place and had not told him that he could not talk during worktime. Huffman had supported the union campaign, speaking to employees about the Union during breaks. However, he denied having interfered with employ-

ees while they were working. On one occasion, when employee Agnes Mash had spoken critically of the Union in the hall to other employees, Huffman told her that she should not say anything about the Union without knowing something about it. He suggested that Mash attend one of the union meetings and listen to union organizer R. W. Brown. Huffman recalled having spoken to Mash about the Union on one other occasion, but not in her work area which was about 40 yards from his work station. Huffman denied ever having approached anyone working on the line about the Union while they were working. He spoke to employees about the Union when passing them on the line, but only if they stopped him to inquire.

Huffman averred that earlier on April 7, the day he was terminated, employee Virginia Brown, who worked in the area, had approached and asked Huffman to read an article she was holding. Huffman told Brown that he could not read. Brown, instead of returning to work, then began to read the article, which was anti-union, to eviscerating line supervisor Ted Roten for about 2 to 3 minutes. Roten did not say anything to Brown while she read and, to Huffman's knowledge, Brown was not disciplined or warned because of having then read that article.

Like Branscome and Barker, Huffman had observed other distractions in the work area. In the spring and summer of 1989, supervisor Jean

Waters sold perfume and what appeared to be Avon products and she and Norman Hale also sold football cards. In the knife room, where knives and scissors were ground and repaired, five employees named by Huffman played poker during worktime and had just finished a short round before his discharge. There also was a football pool conducted in work areas.

Huffman testified that on a number of occasions his own supervisor, Luke Roten, would ask him to get employees who had overstayed their time from the break room. Most recently, this had occurred about a month before Huffman's termination when Roten asked Huffman to get employees Tina Eller and Lynn Billings, who had

overstayed their break by 5 to 10 minutes.[164]

The record reveals that Huffman was terminated pursuant to a complaint initiated by Agnes Mash.[165] Mash testified that in the spring, Huffman walked from line 2, where he was assigned, to behind Mash while she was at work and asked if Mash had signed a union card. Mash said no. When Huffman asked why, Mash replied because you do not fool around with things you do not know about. According to Mash, Huffman told her

[164] Roten confirmed Huffman's testimony that he would send Huffman to get employees from the break room who had stayed past the end of their break periods. When Huffman brought them back to work, Roten simply would chide these employees, but there was no evidence that any employee was ever disciplined for such conduct.

[165] Mash, assigned to line 1, was pulling craws and using clippers to cut the necks of the chickens as they passed her station.

that he went to all union meetings and got free drinks. He then moved down the line.

When Mash's break began, she approached Jean Waters[166] and told her that little Raymond is union crazy; that Huffman had walked over to her and had bothered her while she was working.

Later that day, Mash's immediate supervisor, Ted Roten, told her that she was wanted in the office. He accompanied Mash to the office of personnel manager Barbara Mathis who asked if Huffman had been bothering

[166] Waters was a floating, or extra, supervisor who worked on either lines 1, 2 or 3 as needed. Waters, too, had been selling Avon products at the plant for the past 6 or 7 years, but denied having done so during working time or in work areas. Her practice was to leave a catalogue and order forms in the break room where employee-customers could fill in and leave the forms.

her; what had he been doing. Mash told Mathis that Huffman had been on her line while she was working and asked if she had signed a union card. While Mash waited, Mathis prepared a statement which Mash signed and returned work.

Huffman was terminated the day Mash had mentioned him to Waters.

Mash explained that her objection to Huffman's brief visit had been that she was required to stop working and to turn around when Huffman asked if she had signed a union card. Although Huffman had been with Mash for only a few seconds, Mash had been holding her clippers and the delay in her concentration, at the existing line rate, could have caused Mash not to process certain chickens as they

passed her at a rate of 70 per minute.

Waters confirmed that at the start of her break, Mash had told her that "Little Raymond" had gone union crazy; that Huffman had come to the line and asked if she had signed a union card; that she had told him no, she did not want to; and that Huffman had really bothered her. Mash told Waters that she did not want Huffman bothering her when she was trying to do her job. Holly Farms had been good to Mash and she did not want anything to do with the Union and did not feel that Huffman should be talking to her. Waters then reported this conversation to plant superintendent Danny Eller, who, in turn, conveyed the incident to Mathis.

Mathis recalled that when Mash arrived at her office, she appeared very upset—pale with trembling hands. Mathis asked what in the world was wrong. Mash replied that she was tired of Raymond Huffman aggravating her and talking to her about the Union. She related that when Huffman walked over behind her while she was using clippers to pull craws, it had made her mad and upset. Mash complied with Mathis' request that she give a statement concerning this incident.

Mathis next consulted with plant manager Harold Eller. They reached a decision to terminate Huffman's employment. Accordingly, Mathis called Huffman's immediate supervisor, Luke

Roten, and asked him bring Huffman to her office.

When Huffman, accompanied by Luke Roten, arrived at Mathis' office, she asked if Huffman knew the Company policy about harassing other employees. Huffman said yes. Mathis went on that she had understood that Huffman had been harassing other employees on other lines and that the Company was going to have to terminate him. Huffman protested that he had not done anything. Mathis told him that she had a signed statement accusing him of harassing Agnes Mash on the line while she was working. Huffman reiterated that he had not done anything. Mathis related that Mash told her that Huffman had come to her job station, had harassed her

and interfered with her work, and that Mash had been afraid that she was going to get cut because he surprised her from the rear. Mathis did not ask Huffman for his version of events, claiming that Huffman had just kept repeating that he had not done anything. Mathis also had not consulted with Huffman's immediate supervisor, Luke Roten, about terminating Huffman, explaining that the incident had not occurred on Luke Roten's line. Although Mathis stated that she would have spoken to Luke Roten had the incident occurred in his jurisdiction, she similarly did not consult with supervisor Ted Roten on whose line it did take place.

Luke Roten testified that, prior to Huffman's discharge, only he had ter-

minated employees assigned to him, which he did when they had missed too much work or had not produced.

Luke Roten related that in 1990, he had given a written reprimand to a male employee who had harassed a female employee while both, supposedly, were at work on Roten's production line. The male employee had tried to speak to the female employee who, wearing earplugs, had ignored him. The male employee, stationed next to the female worker, took out her earplugs and set them in the drain. The reprimand was given for pulling out her earplugs. To Roten's knowledge, before Huffman was discharged, there had been no discussion about issuing Huffman a written warning as an alternative.

The Respondents' witnesses contradicted various aspects of Huffman's testimony. Employee Virginia Brown denied having read any literature to Huffman or even to herself while inside the plant. Brown's supervisor, Ted Roten, did not recall that Brown ever had read a newspaper article to Huffman or anyone else in the work area. Ted Roten related that because Brown processed a great deal of product that passed her on the line at the described rate of 70 birds per minute, he would have missed her quickly had she left her station to play poker in the knife area.

Eviscerating department employee Lola Mae Johnson, assigned to line 4, was absent from work on sick leave from March 28 until May 17, but had

seen employees buy and sell merchandise only in the cafeteria, break room and nonwork areas, but not in work areas. Johnson did not play cards but, in any event, would not have had time to do so at the plant. Roscoe Baumgarner, a first shift knife sharpener in the eviscerating department, and offal department employee Freddie Dean Wilmoth who, before 1989, had worked in the knife room, both testified that they had not seen poker or other card games in the knife room or elsewhere in the plant and that all employee purchases and sales of merchandise had taken place outside work areas. The sanctity of work areas from commercialism and gambling was further attested by eviscerating department employee Ron-

nie W. Huffman, unrelated to Raymond Huffman, and main processing plant employee Norman Howell.

(vi) The discharges of Bouchelle, Barker and Huffman—discussion and conclusions

Under Wright Line, A Division of Wright Line, Inc.,[167] the Board requires that the General Counsel make a prima facie showing sufficient to support an inference that protected conduct was a motivating factor in the Employer's decision to act against its employees. If this is established, the burden shifts to the Employer to demonstrate that the same action would have taken place even in

[167] 251 NLRB 1083, enfd. 662 F.2d 899 (C.A. 1, 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

the absence of the protected conduct.[168]

Here, the General Counsel established that Holly Farms, at the time, was extensively utilizing conduct violative of the Act at the Wilkesboro complex in order to discourage unionization.[169] It has been found above that in the period when Bouchelle, Barker and Huffman were terminated, Holly Farms' officials had engaged in a counter-campaign involving unlawful conduct, which included, but was not limited to, causing the arrests of three driver employees who handbilled for the Union during non-work time and in non-working areas;

[168] Hudson Neckwear, Inc., 302 NLRB No. 15 (JD 4).

[169] Custom Bank Glass Company, et al., 304 NLRB No. 46, sl. op. 7.

threatening the arrests and discharges of others; issuing warnings to employees; soliciting grievances from employees and promising to remedy them; threatening closure and contracting of trucking operations and attendant job loss; threatening unspecified retaliation if employees supported the Union; threatening discharge; and coercively interrogating employees concerning their union sympathies. Certain unlawful acts were persistently repeated and publicized so as to affect additional employees.

The General Counsel established that, in this coercive climate, the responsible Company officials, before discharging Bouchelle, Barker or Huffman, knew of their union activities and that such activities had

been the immediate proximate cause of the disciplinary actions against them. The question in each instance is whether the discharges, nonetheless, were justified because these employees had violated a valid, consistently enforced no-solicitation rule, as the Respondents assert.

The respective discharges of Bouchelle, Barker and Huffman were respectively prompted by complaints to management from individual employees when the Respondent's officials knew were opposed to the Union. The officials who discharged Bouchelle and Barker did not personally investigate or interview the complaining employees before taking action and in none of the three cases did the discharging official attempt to obtain the

accused employee's side of the story. Instead, each of the three dischargees were terminated about as quickly as the complaints became known, in departure from existing Company policy. In this regard, second shift personnel manager Mary Barnes testified that, although Holly Farms had an available policy of progressive discipline whereunder employees usually were not discharged for their first offenses, but were penalized for later infractions by a series of increasingly severe disciplinary actions which, for subsequent infractions, ultimately could lead to termination, no consideration had been given to any lesser penalty for Barker than termination. Similarly, in spite of Barnes' reference to the

policy of progressive discipline, lesser penalties than discharge similarly were not considered for Bouchelle and Huffman. This was true although all three employees had performed their work satisfactorily and were considered desirable employees.

In the rush to terminate Huffman, personnel manager Mathis did not take time to consult with Huffman's immediate supervisor, Luke Roten. She explained this departure by stating she would have done so had the asserted offense occurred in Luke Roten's production line rather than on the line overseen by supervisor Ted Roten. However, as noted, she did not speak in advance to Ted Roten, either. Plant engineer Bare, who terminated Bouchelle, did not know at

the time whether Hunt, the employee whom Bouchelle, assertedly, had disturbed, was on break or even in an assigned work area when Bouchelle had approached him.

Considerable testimony was adduced as to whether Holly Farms had strictly enforced rules prohibiting solicitation and distribution in the work areas during work time. The General Counsel's witnesses, on this point, described a work place suggestive of a bazaar, while the Respondents' witnesses who, in practical terms because still employed might have found it difficult to do otherwise, spoke of pristine work areas unsullied by commercialism and gambling—football pools and card games—except in

fringe non-work areas at breaks and during other non-work times.

I accept the logic of the Respondents' evidence that it had tried to exclude buying and selling and other distractions from the work areas during work time. It would be difficult for the Respondents to safely and effectively operate their production lines in circumstances where employees at work were readily subjected to interruptions. This is particularly true with respect to the Respondents' operations where employees used knives, cutting machines, clippers and other sharp implements in their work and where the conveyor systems, within comparatively short time periods, quickly carried large numbers of chickens by the work stations for

processing. Absent discriminatory enforcement, a Company rule against solicitation and distributions in work areas during work time is lawful and, with respect to the Respondent's fresh chicken processing and food service operations, may be quite necessary.

However, the record shows that Holly Farms' no solicitation/no distribution rule was discriminatorily enforced with particular severity against the three pro-union dischargees. The record indicated that termination was not the automatic or necessary discipline regularly applied to employees who interrupted their own work or that of others on the production lines. Although Nancy Ann Anderson's supervisor might not

have been present to see her reading a catalogue with her back to the production line, as shown in the above-described photograph, by the time of the hearing, the Respondents, when they called Anderson to the stand as their witness, were well aware of this incident. Yet, the record contains no indication that Anderson was disciplined in any way. Both plant engineer Bare and supervisor Luke Roten testified that, in the past, they had witnessed, without incident, sales and purchases in the plant transacted by employees who should have been working, and Huffman's immediate supervisor, Luke Roten, had merely issued a written reprimand in response to the 1990 complaint of a female employee on his line that a

male employee, working nearby, had pulled the plugs from her ears after he had unsuccessfully tried to talk to her while she was working. Although production also was adversely affected when employees overstayed their breaks, making it occasionally necessary for Luke Roten to send Huffman to bring such employees back to the line, no employee ever was disciplined for that infraction.

Anderson's tolerated and photographed reading on worktime while turned away from her work station; the overstayed breaks; the incident concerning the employee who received a written warning for pulling the plugs from the ears of his unwilling fellow worker; and the sales transactions witnessed by Bare and Luke Ro-

ten involving employees who should have been working; do not appear to be significantly lesser interruptions affecting production than those charged to Bouchelle, Barker and Huffman.

Accordingly, a combination of factors, including that the Respondent's officials admittedly knew of the union activities of Bouchelle, Barker and Huffman when discharging them; that the Respondents' many violations of the Act established their strong union animus at the time; that, absent union involvement, other employees had been treated more leniently for otherwise comparable offenses; that, with respect to Bouchelle and Barker, the Respondents' terminating officials did not investigate beyond

the relayed complaints of the employees known to be anti-union with a result that potentially important facts were unknown; that, in the apparent rush to discharge, the Respondents did not seek explanations from the accused employees; and that the Respondents departed from their own policies of progressive discipline and of consulting with the affected employees' immediate supervisors, indicates that the three discharges were discriminatory in nature. The abrupt treatment afforded Bouchelle, Barker and Huffman seems particularly harsh since all three, as noted, were considered by the Respondents to have been good employees whose retention might have been beneficial to the Respondents. In this connection, Bark-

er, only shortly before her termination, had been given a more highly-paid job, and it was noted on Bouchelle's discharge form that the supervisors involved would, under certain circumstances, be willing to rehire him. I find that these considerations sufficiently support the General Counsel's argument that the union activities of Bouchelle, Barker and Huffman were principal motivating factors in the decision to terminate them.

This having been shown, I further find that the Respondents have failed to meet their burden of demonstrating that these employees would have been discharged absent their union activities.

Accordingly, I find from a preponderance of the credible evidence that Alvin Bouchelle, Patricia Barker and Raymond K. Huffman, Jr., were discriminatorily terminated in violation of Section 8(a)(3) and (1) of the Act.[170]

(vii) The discharge of Joseph Richardson—facts and conclusions

As the parties agree that Joseph Richardson[171] was terminated for his union activities, the lawfulness of his discharge is dependent upon whether, as group leader on a receiving dock, he was an employee within the meaning of Section 2(3) of the

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[170] Visador Company, 303 NLRB No. 167 (JD 11-12).

[171] Richardson, with Holly Farms for about 12 years, during his last 3 years, had been group leader on the receiving dock at the food services (Convenience Foods) plant in the Wilkesboro complex.

Act and protected under the Act, or whether, as contended by the Respondents, he was a statutory supervisor who had engaged in activities that rendered him vulnerable.

Synthesizing the testimony of Richardson and that of food service plant manager David Fairchild,[172] on March 28, Richardson, was called to Fairchild's office where he met with Fairchild and the then-assistant plant manager, Barry Hatfield. Fairchild asked Richardson what his job was at Holly Farms. When Richardson replied that he was a group leader, Fairchild asked if Richardson understood that being a group leader meant that he was considered a part of the

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[172] Fairchild has continued in the same capacity since the Tyson takeover.

management team. Richardson replied yes, but he did not get into the business much.[173] Fairchild related that he told Richardson that he had a report that Richardson has solicited other people and that he no longer had a job with the Company. Richardson, in turn, testified that he denied to Fairchild that he had participated in organized labor, although admitting in testimony that he had solicited employees on the Union's behalf. Fairchild, however, would not discuss the matter and gave Richardson two choices—either quit or be discharged. Nothing further was said and Richardson left the office and his job. While Richardson's

[173] Richardson testified that, during this interview, he did not agree that he was part of management.

change of status form indicated that he had resigned after reprimand, Richardson testified that he had had no alternative but to leave.[174]

Of about 325 first shift employees, 15 were group leaders variously assigned in the plant. Usually, each supervisor had three group leaders reporting to him.

At the receiving dock, Food Services would receive raw products, such as whole birds and various chicken parts and, occasionally, chemicals for cleaning purposes. The receiving dock also had a trash com-

[174] Although Fairchild had spoken to Richardson on numerous occasions about his job performance and had explained Richardson's job duties as a group leader to him, Fairchild did not recall any specific time prior to the March 28 terminal interview when he had told Richardson that he was a member of management.

pactor where waste, offal and other condemned products were eliminated.

Richardson, as group leader on the receiving dock, reported to supervisor Tony Davis who, in addition to the receiving dock, oversaw employees in the beehive room[175] and the metromatic room.[176] It was Richardson's job to work alongside a receiving dock crew that varied in size according to the number of trucks to be unloaded, but which averaged four to six employees. Richardson's crew regularly included a forklift operator, a trash compactor operator and four employees who did check-weighing. Richardson, under Davis, was

[175] The machines in the beehive room separated meat from rib cage bones.

[176] Metromatic machines sized out chickens.

generally responsible for unloading, receiving, check-weighing, removing trash and condemned materials and for the cleanliness of his area.

Arriving for work about 15 minutes before his crew, Richardson stopped by the transportation department to learn what trucks were in and then proceeded to the plant. He then would call the transportation department for a truck to be placed in one of the dock areas where the crew would unload it. When the truck was unloaded, it would be check-weighed. This was a spot checking procedure to determine if the proper weights were being received. The chicken parts were received in corrugated boxes of 70 to 1,200 pounds, with ice on the top of the box and the contents on

the bottom. The crew would record the weights on the labels of the received boxes by emptying the boxes to be tested; by weighing the emptied boxes to obtain tare, and by refilling the boxes with ice and product. After the crew's checking had verified the shipment, Holly Farms paid for the actual weights received.

The check-weighed product then was moved to the large cooler which also contained a large ice machine which made ice for use in the plant.

The trash compactor operator put accumulated trash into the compactor. The crew also took away offal from the communited meat department, where meat was mechanically removed from the bone, and from other places in the plant where product was condemned

because fallen on the floor. The forklift was used to dump such products onto offal trucks to be driven to rendering.

Richardson also was responsible for ensuring the cleanliness of the areas outside of the plant and it was necessary to wash down around the trash compactor and to remove droppings from trucks. The receiving department also cleaned the cooler once a week. Richardson joined his crew in performing all of the above tasks.

Richardson, unlike the salaried supervisors, was hourly-paid, earning $1/hour more than his crews' base rate and 50 cents/hour more than the next highest-paid member of his crew. Also unlike supervisors, Richardson

received time and one-half for overtime work. While supervisors wore tan pants and white shirts, he wore the same uniform as his crew—gray trousers and a blue shirt.

Richardson did not substitute for Davis or any absent supervisor. A supervisor from another department would act for Davis in such circumstances. Richardson has filled in for absent group leaders, and other group leaders have replaced him in his absence, as has Davis. Unlike supervisors, Richardson was paid for unused vacation time lost during a given year, but he could not carry unused vacation time past the year in which it was earned. Supervisors received paid sick days; group leaders did not.

While Richardson usually had the same employees assigned to him, particularly on the forklift, trash compactor and for check-weighing, he might not have the same number of employees each day—depending on the number of incoming trucks. If he felt that extra help was needed, he would ask Davis for additional employees or, in Davis' absence, another supervisor. These supervisors, if able, would assign the extra personnel. If additional help was not available, Richardson and his crew would have to get along on their own. When the additional employees no longer were needed, Richardson, advising Davis, would send them back to their regular assignments.

Richardson had no authority to hire, fire, discharge, discipline or transfer employees to other plant areas, give employees time off or permission to come in late.

Richardson did the paperwork connected with incoming shipments; told any extra helpers where to work; assigned unloading slots at the dock to incoming trucks; instructed those working on the dock as to where to put unloaded products; and, generally, under Davis, was responsible for the proper performance of work in his area. Nonetheless, the record shows that the work performed by his crew members was basically repetitive and that the people who worked with Richardson knew to perform their jobs without specific direction from him.

Even employees temporarily assigned from other plant areas to help on the dock, as required, often had worked there before and basically knew what to do.

While Fairchild testified that Richardson was consulted by supervision about the work performance of his crew members and could effectively recommend pay raises, Richardson denied that he had such authority although he occasionally was asked by Davis how well certain employees were performing. Since there were layers of supervision between Fairchild and Richardson and as Davis, the immediate supervisor did not testify, I find that Richardson knew his own practical authority better than did Fairchild who had less opportunity to

observe and, therefor, I credit Richardson on this point.

As the evidence establishes that Richardson's instructions to employees were routine and did not require the use of independent judgment; as his duties and responsibilities were limited by the nature of the work involved; as there was no showing that Richardson possessed or exercised any of the indicia of authority defining supervisory status, as set forth in Section 2(11) of the Act, and, noting, too, the similarities between Richardson's duties and status and those of dock leadman Freddie Lee Martin in Central Freight Lines, Inc.,[177] where supervisory status was

[177] 250 NLRB 435, 446-447, 449-450, enfd. 653 F.2d 1023, 108 LRRM 2457, 2458 (C.A. 5, (continued...)

not found, I conclude that Richardson, when terminated, was not a supervisor within the meaning of Section 2(11) of the Act but was an employee, as defined in Section 2(3) of the Act, and, therefor, entitled to the Act's protection.

Accordingly, having found, above, from the undisputed evidence that Richardson was discharged because of his union activities, and also having found, contrary to the Respondents, that he was an employee within the meaning of the Act, I conclude that the Respondents violated Section 8

[177](...continued)
1981). Also see W.C. McQuaide, Inc., 220 NLRB 593, 611, enfd. in relevant part 552 F.2d 519, 94 LRRM 2950, 2959 (C.A. 3, 1977); supplemented at 237 NLRB 177 and 239 NLRB 671, enfd. 617 F.2d 349 (C.A. 3, 1980).

(a)(3) and (1) of the Act by terminating him.

(b)(i) The July 2 pay increase—facts

By memorandum to its hourly employees, dated June 16, over the signatures of Dr. Ken May, chairman and chief executive officer, and Blake Lovette, president and chief operating officer, Holly Farms announced that, effective July 2, that Company's hourly employees who worked in nonbargaining units would receive a 25 cents-an-hour wage increase, and that the Company would implement a wage adjustment of 4 percent for its employees covered by production pay systems. The memorandum noted that this wage increase would not have been implemented until January 1, 1990, except that the Company's mar-

kets were better than anticipated and Company-wide efficiency had increased, thereby enabling implementation of the wage increase 6 months earlier than otherwise. The memorandum ended on a congratulatory note to the employees.

The General Counsel and the Union contend that the granting of this raise represented a departure from Company policy which did not provide for pay increases at that time, and was a retreat from its December 16, 1988, written announcement of a one-time 3 percent bonus for 1989 based on the employees' projected 1988 earnings. This bonus was to be distributed on December 22, in addition to the employees' regular Christmas bonus. The December memorandum

specified that the employees would be receiving the 3 percent bonus as an expression of Company appreciation for work well done and instead of any wage increase during the coming year. This was because the Company had found, in comparing itself to its competition, that its pay rates, in most instances, were higher than the rest of the poultry industry. Accordingly, to keep Holly Farms competitive with other poultry companies, the Company announced that it was making that special advance payment for the employees' 1989 efforts and that it would not again raise wage rates for 1989.

Holly Farms' president Blake Lovette principally explained the general wage increase given to Holly

Farms' employees, effective July 2, shortly before the takeover by Tyson. He related that after the fiscal year that ended in May 1988, Holly Farms had implemented Company-wide efficiency plans closing certain processing plants and consolidating driving operations with a result that employment had been reduced by more than 1,000 jobs. In December 1988, while the Company was implementing a plan that was likely to take at least 2 years to fully put in place, Lovette did not want to follow the Company's normal practice of announcing a wage increase in December 1988, to become effective in January 1989, because of market uncertainties. Accordingly, instead of a pay increase, he gave the employees the one time bonus-type

check amounting to 3 percent of their 1988 wages as their pay increase for 1989. This enabled the Company to give the employees a wage increase without raising the pay base and the job benefits predicated on that pay base, and to avoid getting further out of line with its competition.

Lovette explained that, although he had announced that no raises would be given during calendar year 1989, as matters developed, the Company did extremely well during the first half of 1989. Most plans that had been effectuated during the preceding 9 months had begun to work. The reduction of about 1,000 jobs had had an immediately beneficial financial effect but, most importantly and unexpectedly, in the spring of 1989,

chicken market prices took a sudden 20 percent per pound increase so that the fourth fiscal quarter earnings, covering March, April and May, constituted a record quarter in Company earnings.

Accordingly, on the recommendation of senior management, Holly Farms gave a 25 cents/hour pay increase to its unrepresented employees, effective June 2, and, around June 24, gave a 4 percent pay increase to all production systems employees at all locations, excluding the processing plants at Center, Texas, and Glen Allen, Virginia, which locations then were, and have continued to be, under contract with United Food and Commercial Workers Union, AFL-CIO, CLC.

The raise also was not given to employees in the Holly Farms drivers-yardmen transportation department unit, which the above seven local unions had been certified to represent since March. During contract negotiations for that unit, Holly Farms had offered the Unions the 4 percent pay increase for the drivers, tied to a proposal that would leave wages as they were for a 1 year period. This offer remained on the table, unaccepted, until withdrawn by Tyson after that Company assumed control.

(ii) The July 2 pay increase—discussion and conclusions

In Elston Electronics Corp.,[178] the Board restated the presumption

[178] 292 NLRB 510, fn. 2, 525-526.

that when an employer announces a wage increase after the start of a union's organizing campaign, the Board automatically and without further showing will presume that the increase was granted in an effort to influence the campaign and that the burden then shifts to the Respondent Employer to rebut this presumption. This can be done by showing that the increase would have been granted without regard to the protected union activity.[179] As indicated in Elston Electronics Corp., supra, the Respon-

[179] Member Cracraft's concurrence in Elston Electronics Corp., supra, at 510, fn. 2, was not based upon her adoption of the presumption that a wage increase timed after the start of a union's campaign was unlawful but, rather, that when such a coincidence occurs "absent an affirmative showing of some legitimate business purpose for the timing, it is not unreasonable to draw the inference of improper motivation and improper interference with employee freedom of choice."

dent may meet this burden by showing that the pay increase would have been granted without regard to the union activity by demonstrating the existence of an established pattern of wage increases, a pre-organizing administrative commitment to the increase, or any similar legitimate business justification. As stated in Zarda Brothers Dairy, Inc.:[180]

> The unlawfulness of the granting or announcing of benefits during the Union's organizational effort depends on whether from all the circumstances, the employer's purpose was to cause employees to accept or reject the representative for collective bargaining . . . and upward revisions of employment terms are presumptively unlawful, even if made upon determinations made prior to the advent of union activity.

[180] 234 NLRB 93, 112.

In determining the validity of the Company-wide pay raise given here during the Union's campaign, it is relevant that Holly Farms' Wilkesboro employees, targeted by the Union for organization, were but a percentage of the total number of employees who were given the pay raises. In Delta Faucet Company, A Division of Masco Corporation of Indiana,[181] that consideration was a factor in the dismissal of a related allegation. Here, in addition to Wilkesboro complex employees, who, with noted exceptions, received the disputed pay raise, wage increments concurrently also were provided to employees at the Holly Farms' plants in Harrison-

[181] 251 NLRB 394, 399. In Delta Faucet, as here, the pay raise in issue was not given at a regularly-scheduled time.

burg and Temperanceville, Virginia; Monroe, North Carolina; and Seguin, Texas. As noted, this pay raise was not given to union-represented employees in Holly Farms' transportation department and at its Center, Texas, and Glen Allen, Virginia, plants. The present case, however, differs from Delta Faucet, supra, in that the pay raise in that matter was accelerated under a tangible need to comply with the effective date of a national inflation guideline and there had been far less anti-union animus. The size, timing and applicability of the wage increase given here proceeded entirely at the Respondents' option and ran contrary to relevant policy declarations made in mid-December 1988, only days before

the Unions' campaign became known to management.

Accordingly, while I accept that Holly Farms' business situation improved during 1989 and that employees at the Company's locations other than Wilkesboro also received the same across-the-board pay raise, the granting of these raises in the circumstances herein, just a few weeks before the representation election for the live haul employees and in the midst of a concurrent organizational drive among Holly Farms' Wilkesboro production employees, leads me to conclude that the July pay raise was timed to induce those employees to reject the Union. As noted, this pay raise not only was

not scheduled,[182] but was inconsistent with the Respondent's December 1988 announcement, just before the Company concededly had learned of the organizing drive, to substitute the 3 percent bonus for any wage increases during 1989 and thereby avoid elevating the pay base and dependent benefits. Also, as argued by the General Counsel, the timing of the pay raise was inconsistent with what, until only shortly before, had been happening within the live haul department where the drivers had found it necessary to complain during their above interviews with live haul manager Ray Lovette that they were unable to live on their income from 4

[182] Customarily, wage increases were announced in December to become effective during the following month.

day workweeks. Also, while Holly Farms' business might have improved during 1989, there was no indication as to how long the good times would last, and conditions still were not sufficiently good to have deterred Holly Farms from seeking a purchaser for its business. In fact, the raise became effective just 2 weeks before Tyson's imminent takeover.

Accordingly, I find that the pay increase that became effective on July 2, as applied to live haul unit and production employees was discriminatorily given to induce its employees in the live haul and potential production bargaining units not to support the Union. In so doing,

the Respondents violated Section 8(a) (1) and (3) of the Act.[183]

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[183] Marines' Memorial Association, d/b/a Marines' Memorial Club, 261 NLRB 1357, upon which the Respondents rely, is readily distinguishable from the present situation. In Marines' Memorial Club, supra, the Employer had followed a practice of giving its employees two pay raises a year, effective each January 1 and each July 1. In 1980, because of adverse financial reasons, the Respondent in that matter delayed the January raise for 1 1/2 months, into February, and then provided a smaller increase. The Employer gave the next raise early, on June 1, rather than July 1, and in amounts substantially larger than the February 15 increase. The Board found that the deviations involved in the February 15 raise were based on ordinary business considerations and that, as established by the Employer's credible testimony supported by business records, the earlier June 1 raise was made possible by a dramatic improvement in its business profitability and that the June increases had been made larger to make up for the smaller prior raise which, also had been delayed by 1 1/2 months. The Board noted that the deviations that had occurred in connection with the February raise were before the start of union activities and that the changes involving the timing and amounts of the June raise were good faith attempts on the Employer's part, in view of "dramatically" improved business conditions, to enable its employees to recover from the delayed, smaller February increase. Here, unlike Marines' Memorial Club, the Respondents did not attempt to adhere to any time structure for the giving of pay increases, but rather departed not only from its own existing scheduling for granting of raises, but, also, from its announced intentions in (continued...)

(c) The alleged unlawful subcontracting of transportation department drivers' work—facts and conclusions

The General Counsel and Unions contend that since the seven local unions' March 24 certification as bargaining representative of Holly Farms' transportation division unit of drivers and yardmen, that Company retaliated for its employees' selection of the Unions by increasing its use of outside freight carriers to perform hauling previously done by Holly Farms' long distance drivers. The General Counsel and Unions charge that the disputed increase in subcontracting diminished the drivers' job

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[183](...continued) that regard. The Respondents' generousity at the critical pre-election time when the July 2 raise was given also was inconsistent with the 4 day workweek afforded live haul drivers only a short while before.

security, work opportunities and incomes.

The Respondents who, in addition to their own trucks, long had used outside freight carriers, agree that Holly Farms in 1989 did increase the work made available to outside carriers. However, the Respondents contend that this was but a continuation of a program that had been planned in detail and implemented well before the start of the Unions' organizational campaign and was carried, forward, in response to legitimate business needs unrelated to the Unions.

Long distance drivers William Franklin Johnson, John E. Danner, Harden Branscome, Teddy Ray Hayes and Gene Hester testified that they had lost work time and income when Holly

Farms, because of the Unions' successful campaign and its aftermath, increasingly contracted out what had been their unit work.

Johnson who, unlike the other above-named Wilkesboro drivers, was based in Glen Allen (Richmond), Virginia, testified that, in 1988 at various Holly Farms' facilities, including Glen Allen, he had seen outside carriers' trucks at Holly Farms on an average of 2 or 3 days a week, but that from the beginning of 1989 until Tyson's July takeover, outside carriers' trucks were on Company premises every day.

Danner related that from December 1988, when the Union's campaign began, until the March election, his assigned trips were about 15 percent

below the corresponding period of the previous year. After the March election, the length and frequency of his runs again were materially diminished with a corresponding drop in income. During 2 weeks in April, he had one run per week where, previously, he would have undertaken approximately three trips per week. Operators of outside carriers' trucks, which he first noticed on Company property during the last week in April and throughout May and June, took trips that idled Company drivers had been taking to Ohio, Michigan, New Jersey, Florida, Alabama, western Tennessee, Kentucky and Indiana. In comparison to a corresponding period during the preceding year when Danner had been driving approximately 1,800 to 2,400

miles per week, from the last week of April through June 1989, Danner averaged about 600 miles a week. Accordingly, his projected annual earnings, when compared to the previous year, were reduced by $10,000 to $11,000.

Driver Robert Gwyn Wyatt explained that while Holly Farms always had used outside contractors to haul its products, before the March election, such contractors had been used to haul Company surplus when there was more freight than Company drivers could handle. However, within 3 weeks to a month after the election, Holly Farms changed its policy to give the bulk of its freight hauling to outside carriers and the situation, from Wyatt's standpoint, thereafter worsened. While Wyatt did not

retain his pay stubs, he recalled that, after the election, his weekly earnings were down by $300 to $400 from what they had been done during the Unions' then-recent campaign.

Driver Harden Branscome observed that from about 2 weeks after the March election, and, increasingly, "to get really bad during the summer," Holly Farms expanded its use of outside carriers. Outside carriers' trucks received more runs than did the Company's drivers. Accordingly, Branscome's pay stubs show that his gross income for the first 9 months of 1989, from January 1 to September 16, was nearly $3,070 less than for the same time frame for the preceding year.

T. R. Hayes and Hester gave similar testimony about the Company's increased use of outside trucks and its impact on them. Hayes related that when he returned from a run before the March election, he would notice three or four contractors' trucks in the yard. After the election, he saw from 10 to 15 such trucks daily while Hester spotted 20. Not only did this contribute to a reduction in Hayes' gross income in the first 9 months of 1989 by more than $4,900 from the same period the year before, but that, even when Hayes did get work, the situation created inconvenience. When returning from a run before the election, Hayes readily could find space within the drivers' room to do his paperwork. However, after the

election, the room was so filled with outside drivers that he had no room and he had to do his paperwork at a truck stop before going on to the Company's premises.

Hester's gross earnings during April 1989 were $1,815 less than for the same month in the preceding year.[184]

David G. Hayes[185] testified for the Respondents that, in March 1988,

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[184] The above diminutions in drivers' earnings from 1988 to 1989 were not caused solely by decreased work from subcontracted freight hauling. As noted, during 1988, Holly Farms had taken certain other actions to reduce the pay of long distance drivers. These steps included the elimination of pallet pay and the reduction of holiday and of waiting time pay.

[185] Hayes, who had held positions of increasing responsibility with Holly Farms since joining that Company in 1977, became operations manager of Holly Farms' transportation division in 1987, and that division's vice-president on June 1, 1988. Effective September 24, after Tyson assumed control, Hayes became eastern division manager, Tyson Transportation.

about a month after becoming Holly Farms' president, Blake Lovette decided to reduce delivery costs by making substantially greater use of outside carriers, thereby de-emphasizing and reducing the Company's truck fleet.

On March 18, 1988, about 9 months before the start of the Unions' campaign, Hayes sent a memorandum with five attachments to his then-immediate superior and predecessor as vice-president of transportation, Odell Whittington, Jr. This document reported the results of a survey of conditions at the Company's Temperanceville, Virginia, facility and set forth information pertinent to replacing the Company-owned fleet with outside carriers. The detailed memo-

randum enumerated various considerations which, although directly related to the logistics of the Temperanceville facility, were of more general applicability. Hayes, in his memorandum, weighed the use of outside carriers over Company-owned trucks with respect to Company control over deliveries;[186] the costs of deliveries;[187] the percentage of Holly Farms' customers who would accept deliveries only by Holly Farms' drivers;[188] and the fact that the shortage of cooler space inside the Temperanceville plant and at other Company facilities made necessary the use of Company-owned refrigerated trailers for storage, reached certain conclusions and made certain recom-

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[186] Holly Farms, in this regard, could exercise greater disciplinary control over its own drivers, making recurrent infractions less likely. However, when outside carriers' drivers did not fulfill established Holly Farms requirements, the contractors could be compelled to pay only monetary penalties which, over time, added up without satisfactorily addressing basic problems.

[187] One cost referenced in Hayes' memorandum is that Holly Farms, in operating its own trucks, paid for round trip deliveries while outside carriers charged only for one way deliveries. This was somewhat offset in that outside carriers, in billing Holly Farms, would factor in their costs in deadheading (returning without freight). Another cost factor was off-loading. This would occur when an outside truck was not available at a Holly Farms plant when perishable product was scheduled to be loaded. In such cases, it would be necessary to first load the product into refrigerated Company-owned trailers and, when the outside truck appeared, to off load from the Company trailers onto the outside carriers' trailers. As indicated in Hayes' memorandum, off-loading was not beneficial because it tied up the loading dock, caused additional labor expenses and, occasionally, resulted in product damage.

(continued...)

[187](...continued)

[188] The survey reported in Hayes' memorandum that 14.1 percent of Temperanceville loads were necessarily delivered by Holly Farms' drivers because, if Company drivers were not available, the customers involved would have to be separately persuaded to accept delivery by an outside carrier. This was because Company drivers, more appreciative of the customers to the Company's business, established relationships and tried harder to meet the customers' requirements.

mendations. Hayes concluded that the argument as to whether Company drivers or outside carriers would do a better job always would exist because both could get the Company's product to the market on time. However, he noted that Company drivers could be controlled while outside carriers could not; that the results of customer relations and costs from failure by an outside carrier's driver were much worse; and that while Company drivers could be dealt with and problems terminated; the services of an outside carrier could only be eliminated, creating a need to find a replacement. Nonetheless, Hayes concluded that the cost and capital savings from increased use of outside carriers made such a process viable

and he recommended a series of measures to put such a scheme into effect. These included gradually eliminating the Temperanceville-domiciled tractor fleet as dependable carriers can be found.

After completing his March 18 memorandum, Hayes discussed that document with president Blake Lovette, who expressed the desire to pursue increased use of outside carriers while de-emphasizing the use of Company-owned trucks. Accordingly, between March and May 1988, Hayes, as directed by Lovette, prepared an annual operating plan for various Holly Farms' locations showing projected quarterly savings on outside carrier usage during the Company's coming June 1 through May 31 fiscal year.

At the time the operating plan was developed, Holly Farms was using its own trucks to make approximately 80 percent of its deliveries and outside carriers for the remainder. Projecting gradual diminution of the use of Company-owned trucks at Holly Farms complexes during each quarter of the Company's fiscal year, Hayes anticipated appreciable savings as the percentage use of outside carriers commensurately was gradually increased.

To make the projected operating plan a reality, Hayes prepared a written plan of action, dated May 26, 1988, and sent the then-outhaul manager, Barry Wood, to each of the Holly Farms' Virginia locations where Wood reviewed the 1989 projected operating plan with the respective dis-

patchers, listened to their problems, on occasion met with outside carriers' representatives and secured the lead dispatchers' commitment to the plan. Additional steps were taken and Wood obtained local commitments for reductions of tractors and trailers at Temperanceville and Glen Allen by June 20, 1988. Hayes conveyed the results of Wood's Virginia trip so Lovette in a June 15, 1988, cover memorandum to Wood's more comprehensive report.

On June 1, Hayes succeeded Odell Whittington, who had retired as vice president of the transportation division on June 1. That month, the first reductions in the Company's fleet were made. Four tractors were eliminated and four drivers were laid

off from Glen Allen; eight tractors and four drivers were taken from Temperanceville; and, at Wilkesboro, four tractors but no drivers were eliminated.

Hayes suffered a heart attack on June 16 and did not return to work until August, part-time, and full-time in September. Whittington, recalled from retirement to substitute for Hayes, instead of continuing to reduce the size of the fleet, began to reverse that process. Further fleet reductions did not occur until after Hayes' return. By memorandum, dated July 11, 1988, from Blake Lovette to Whittington and Hayes, issued in Hayes' absence, Lovette stated that his view that Holly Farms had too much power equipment and that it

was being under utilized. Lovette requested a brief report on weekly power equipment utilization with a view to moving from the then-current 98,000 miles/year level usage to 130,000 miles/year. He also requested a plan to reduce the Company's tractor fleet by about 30 power units.

Hayes described transition-delaying problems experienced in obtaining appropriate carriers. These included difficulties in hiring carriers willing to run out of certain traffic lanes in order to enable Holly Farms to get better coverage in areas it served around the country; in finding carriers that met insurance guidelines; and in obtaining carriers that would drop off refrigerated trailers

on the Company's lot before arrival of the tractors, thereby adding to the Company's storage capacity, which was in short supply at the plant. Hayes also cited his own inexperience.

The next fleet reduction occurred in January 1989, with the elimination of two tractors and two drivers' jobs.[189] In May, the following further reductions were made:[190] Harrisonburg and Glen Allen, respectively —four tractors retired and four

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[189] Hayes admitted to first learning of the Unions' organizing campaign among the Company's transportation department employees on December 23, 1988.

[190] The Company initially had proposed the May reductions to the newly-certified Unions in March, but delayed implementing them until May because the Unions had delayed this response. The parties agree that Holly Farms, before Tyson assumed control, had bargained in good faith on the matter of increased use of trucking contractors and related reductions in the Holly Farms fleet.

drivers laid off; Wilkesboro—six tractors retired and approximately four drivers laid off.[191]

Company records reveal that, from the weeks ending July 30, 1988, through July 15, 1989, Holly Farms used outside equipment for an average of 16 percent of its delivery runs. During the first 35 weeks of that period, from the week ending June 30, 1988, through the week ending March 25, when the Board certified the Unions as bargaining representative, Holly Farms' use of outside equipment averaged 14.5 percent. In the 15 weeks that followed, this figure increased to an average of 18.9

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[191] Although the Company had planned to lay off a total of nine Wilkesboro drivers, attrition had reduced the number of necessary layoffs.

percent—an averaged increase since the certification of 4.4 percent.[192]

Hayes, in a June 7 memorandum to Pete Lovette, Holly Farms' treasurer,[193] outlined a plan for upgrading the Company's current outside carrier group to provide improved levels of service and timeliness of deliveries; to increase the number of available outside carrier power units to the plants; and to decrease the amount of off-loading between Company and outside trailers, and to achieve other purposes.

Blake Lovette explained that factors causing increased reliance on outside carriers during 1988 and 1989

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[192] As noted, in mid-July, Tyson assumed control of Holly Farms.

[193] As noted, Pete Lovette formerly had headed the transportation group.

were: (1) that Holly Farms' costs per mile were higher than the entire industry average and, in many cases, the product could be hauled more cheaply by contract carriers than by use of Company-owned equipment; (2) that Holly Farms' attempts at running its equipment on additional revenue (loaded) miles resulted in tying up the Company's equipment for longer periods so that, with the same number of trucks, fewer were available in which to haul chickens; (3) and that certain tractors were sold and not replaced in accordance with Holly Farms' stated objective of eventually hauling about 65 percent of its own product in Company-owned vehicles and using independent contractors to haul the remainder.

Since, as noted, the Company's refrigerated trailers also were used for additional storage at the plants, their numbers were not affected by these reductions.

Hayes explained that factors determining whether loads would be carried by outside contractors as opposed to Company-owned trucks included the volume of product loads to be delivered; the availability of outside carriers, as affected by seasonal considerations and by holidays; the presence of Company equipment which had to be kept moving; and the availability of carriers to go to the required areas. It was particularly necessary to use Company carriers when business was slow or when outside carriers were not accessible.

Holly Farms also preferred to use its own trucks on trips when backhauls were indicated.

Hayes testified that by reducing its fleet and using outside carriers, Holly Farms was able to lower its costs, although deliberately trading off some Company service capability. He explained that the cost-efficiency in increased use of outside carriers was exemplified by the practice of other companies in that industry with whom Holly Farms then competed. For example, Perdue Foods hauled half its deliveries on its own trucks and contracted the rest. Valmac Industries, a Tyson subsidiary where Blake Lovette earlier had been president, and Conagra, Inc., a large food company with a 9 percent share in the domes-

tic chicken market, did not use their own vehicles, while Tyson hauled only about 30 to 35 percent of its own product on their own trucks.

In agreement with the General Counsel, I have found above that, before the March representation election, various Holly Farms officials repeatedly made unlawful threats to long distance drivers that the Company would close its transportation department, contract its hauling to outside carriers and take away its employees' jobs if they chose the Unions to represent them—in sum, that the Company had threatened that it would do precisely what it is now charged with having done. However, in application, the weight of the credible evidence, supported by sub-

stantial documentation, shows that Holly Farms' increased use of contract carriers after the March representation election actually was consistent with long-term plans and policies that had been conceived in detail and which had commenced well before the start of the Unions' organizing campaign, and also that its actions in this regard were consistent with the practices of other employers competing in the same industry. The Company's increased use of contractors, therefor, was based on a demonstrated business need to become competitive in its delivery costs, rather than on its well-established desire to defeat the Unions. It further is noted that after the Unions were certified as bargaining repre-

sentative, the Company bargained in good faith on the matter of outside contractors and that, during the 15 weeks that followed the Unions' certification, the increase in the use of outside carriers was a controlled 4.4 percent.

Therefor, as the General Counsel has not established by a preponderance of the evidence that the Respondents increased their actual use of contract carriers for hauling in retaliation for its employees' having selected the Unions to represent them, I find that the Respondents did not violate Section 8(a)(1) and (3) of the Act in this regard.

(d) <u>The alleged discriminatory reductions in drivers' earnings —facts and conclusions</u>

The General Counsel contends that by their subcontracting practices, the Respondents discriminated against long distance drivers Gene Hester, Robert Gwyn Wyatt, Harden Branscome, Teddy Ray Hayes and John Danner by dramatically reducing their earnings in early 1989 from what they had been during corresponding periods of the preceding year. This alleged unlawful conduct assertedly followed receipt by Holly Farms' president, Blake Lovette, of a December 29, 1988, letter from union organizer R. W. Brown in which these men and six others, all employed in the Holly Farms transportation department, Wilkesboro, were identified to man-

agement as members of the Unions' in-plant organizing committee. As discussed more fully above, all of the five above-named drivers were unlawfully threatened by Company officials that the transportation department would be closed, that hauling work would be contracted to outside carriers and that their jobs would be lost if the employees selected the Unions to represent them. These employees also were subjected to other unlawful conduct.

The record shows, also as more fully described above, that each of these men were active union supporters and that, after the Unions were certified following the March election, Wyatt attended at least five negotiating sessions as a member of

the Unions' committee. Wyatt, too, as found above, had been subject to threats of retaliation by driver-coordinator John Sloop in the drivers' room in the context of his union activities following his accident while driving on an icy, snow-covered road, and, shortly before that incident, he had turned down Sloop's suggestion that he forego the Unions and join in a committee to negotiate with management.

Pay records show that in January and February 1989, Danner averaged, respectively, $358 and $72.50/week less than during the same months of the preceding year. Wyatt, during those same months, averaged, respectively, about $111.39 and $275/week less than during the same weeks of

the corresponding months of the preceding year. Branscome's pay stubs showed that for about the first 9 months of 1989, his gross earnings were $3,069.37 less than during that period of 1988, while Teddy Ray Hayes' stubs for approximately the same period in 1989 showed gross earnings that were down from the corresponding 1988 interval by $4,916.40. There was evidence of further earnings reductions for Wyatt and Danner in 1989.

While the foregoing facts and figures, in the context of the Respondents' other above-found unlawful conduct affecting these same employees, create suspicion of discrimination, particularly in view of the size of the pay reductions, they do

not prove by an evidentiary preponderance that discrimination, in fact, occurred. The record shows that these five employees were not alone in having been identified to management as active in the Unions' campaign. In a series of four letters, respectively dated December 29, 1988, February 20, 27 and March 6, 1989, to Holly Farms' president Blake D. Lovette, Union organizer R. W. Brown named, including the above 5 men, a total of 52 Wilkesboro employees as members of the Unions' in-plant organizing committee. In that correspondence series, the Unions also so identified 26 Glen Allen employees, 11 Monroe employees, 18 Temperanceville employees and 1 employee at Harrisonburg. As noted, the initial

December letter, in addition to naming the five men asserted as discriminatees, also identified six other Wilkesboro in-plant organizing committee members. The record does not indicate that any of these many other spotlighted union adherents were comparably discriminated against or that the earnings of Branscome, Wyatt, Hester, Hayes and Danner, however, lessened for 1989 as compared to 1988, had been reduced below the compensation for other similarly-situated transportation department employees during the times in question. While these five employees plainly have earned substantially less than in comparison periods, there is no showing that, in their earnings, they were treated differ-